JAMES H. MCKE...

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

JOHN D. MCPHERSON, Executor of JOHN T. COCHRANE, Appellant,
vs.
HENRY E. MCKEE and others.
} No. 291.

Notes of Argument for Appellant, John D. McPherson, Executor of John T. Cochrane.

GEO. F. APPLEBY,
CALDERON CARLISLE,
For McPherson, Executor.

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Notes of Argument for Appellant, John D. McPherson, Executor of John T. Cochrane.

This appeal and that of Gilfillan *et al.*, No. 203, are the only ones before this court in this cause—the interpleader case.

The only fund in controversy in this court is the general fund of $147,057.63 paid into court *in this cause*, to abide the final decree *in this cause*. (Rec. p. 149.) The complainant herein, McKee, originally filed a bill in the nature of a bill of interpleader, but he afterwards amended his bill so as to make it strictly a bill of interpleader, and after all the defendants had answered the amended bill, the court below decreed October 1, 1889, that the bill of interpleader was properly filed; that the defendants interplead as to the fund paid into court by complainant McKee in this cause; that McKee be dismissed as a party to the suit; that the respective answers of the defendants in the cause be taken and considered as

the interpleading directed; and that defendants and each of them be perpetually enjoined from instituting or prosecuting any proceeding at law or in equity "FOR THE RECOVERY OF THE SAID SUM OF MONEY HERETOFORE PAID INTO THE REGISTRY OF THIS COURT BY THE COMPLAINANT OR ANY PART THEREOF."

The decree was stated to be made "*without prejudice*" to the right of any of the defendants to recover from complainant any demands which they may have against him "*for amounts due from him over and above the money so paid into court.*" (Rec. pp. 149, 150.)

The suits of Lamon and Latrobe against McKee had already been filed and were being prosecuted against McKee. These suits sought to establish a trust as against McKee as to the whole sum drawn by him from the Treasury—*including the amount paid into court by McKee in the interpleader suit*—but from and after the passage of the decree of interpleader, October 1, 1889, Lamon and Latrobe were enjoined from prosecuting their suits in so far as they sought to recover against McKee the fund paid into court, or any part thereof. After the filing of the original bill by McKee in the nature of a bill of interpleader, and before the filing of the amended bill, Gilfillan *et al.*, assignees of Luke Lea, filed a cross-bill in this cause in which they sought to establish, as against McKee, a trust with reference to a larger amount and a different fund from that paid into court in this cause; the cross-bill was demurred to and dismissed by decree of the court below on December 4, 1889, and from that decree Gilfillan *et al.*, appellants in No. 203, appealed to this court, as well as from the final decree distributing the fund. *But so much of their appeal as relates to the decree of December 4 has been dismissed in this court.*

There is no appeal in this court from the decree of interpleader passed in this cause on the first day of October, 1889, above set out. As already stated, nobody has prosecuted an appeal from the final decree disturbing the fund

in this interpleader cause, except John D. McPherson, executor of John T. Cochrane, and Luke Lea's assignees, who claim under Cochrane's will.

And now that the appeal from the decree below sustaining the demurrer to their cross-bills is dismissed and abandoned, the rights of Cochrane's executor and Luke Lea's assignees constitute one interest in form, as they always did in substance; and the appellants in Nos. 203 and 291 desire that the two appeals may be heard as one cause, entirely separate and distinct from Nos. 224, 225, and 226, which are appeals in the separate proceedings of Latrobe and Lamon against McKee, which causes were never consolidated, and could never properly have been consolidated with the interpleader cause, in which the only question was and is the proper distribution or award of the very fund paid into court by McKee in this cause, from which he has been discharged, on the averments of his amended bill. And the very decree discharging McKee and directing defendants to interplead in this cause, perpetually enjoined the Lamon and Latrobe suits, in so far as they sought to obtain decrees against McKee for the money paid into court in this cause, or any part thereof.

With the broad and far-reaching questions raised by all the parties in the Lamon and Latrobe suits, the appellants herein and this court have no concern in this cause. The jurisdiction of the court below over the fund in court and the parties to this cause is beyond question under the principles of equity jurisprudence and practice; and any other question which could have been raised is not now open in this court because there is no appeal from the decree discharging McKee, directing the defendants to interplead as to the fund in court, which was to abide the decree in this cause, and enjoining the defendants from proceeding in any manner against McKee as to the fund in court, the origin and character of which was

fixed by the averments of McKee's amended bill so soon as the court decreed it to be properly filed and discharged the complainant.

The Fund.

The general fund of $147,057.63, which alone is in controversy in this court, is 5 per cent. of the 30 per cent. always dedicated by the Choctaw Indians in all their contracts to the payment of attorneys and agents in the prosecution of their claims; it is no part of the 20 per cent. reserved to the Indian delegates who represented the nation in its dealings with the attorneys and with the government; it is no part of the remaining 50 per cent. reserved to the nation for the claimants.

It might well be argued that by analogous legislation to the captured and abandoned property act of the United States the Choctaw Nation had constituted itself a trustee of the proceeds of its claims in the proportions above indicated, 30 per cent. for attorneys who had rendered service, 20 per cent. for the delegates who had acted for it, and 50 per cent. for the individual claimants; but it is only necessary to allude to this idea as shedding light on the real origin and character of the fund which lawfully came into McKee's hands, in which he claimed no property, and as to which he properly filed the bill of interpleader herein.

This 5 per cent., or $147,057.63, is the 5 per cent. mentioned in McKee's contract of July 16, 1870. That contract secured to Blunt and McKee 30 per cent. of these Choctaw claims, "the said Blunt and McKee to PAY to Mrs. John T. Cochrane of Washington city, D. C. (5) five per centum from the (30) thirty per centum before referred to, whenever they shall receive the same."

John T. Cochrane.

Now, who was Mrs. John T. Cochrane? And why should the Choctaws require and Blunt and McKee agree "TO

PAY"—not to *give* her 5 per cent. from the 30 per cent always dedicated by the Choctaws to the payment of attorneys, and first secured to Blunt and McKee in this very contract of July 16? Mrs. John T. Cochrane was the widow of John T. Cochrane, appellant's testator, and John T. Cochrane was the chosen, trusted, and successful attorney of the Choctaws, who had served them with zeal and fidelity from 1853 to 1855, who contracted with them in 1855 to continue his zealous and faithful service, and to bring their claims to a final and satisfactory adjustment and settlement. It was this same John T. Cochrane who conceived the idea of presenting the claims in such shape that they were finally and satisfactorily adjusted and settled by the Senate award; which award this court held, after the lapse of nearly thirty years and after the Court of Claims had taken an entirely different view, was a "final and satisfactory adjustment and settlement" of the claims, and measured alike the obligation of the United States and the right of the Choctaw Nation. It was this same John T. Cochrane who obtained an appropriation under that award of $250,000 cash and $250,000 in bonds, and secured the actual payment to the Choctaw Nation of this $250,000 cash. It was this same John T. Cochrane who, when the Choctaws had endangered their rights by their conduct towards the government during the civil war, in the last year of his life was instrumental in securing the treaty of 1866, whereby the claims were saved.

It was this same John T. Cochrane who on his deathbed made his will in 1866, and bequeathed his interest in a certain contract with the Choctaw Indians and the "*amount due him thereon*" to his executor upon trust to collect "the amount due thereon," or to sell, assign, or compromise the same as he should deem most for the interest of his estate. He named his friend John D. McPherson, the appellant here, executor, but he did not execute his hastily drawn will till he had honestly acknowledged an

equal interest in the Choctaw contract to belong to Colonel Luke Lea.

JEREMIAH S. BLACK.

McPherson's executor learned that Cochrane in his lifetime had entered into a conditional arrangement with Jeremiah S. Black for the further prosecution of the net proceeds claim *by obtaining an appropriation for the unappropriated residue of the Senate award*, and this arrangement was carried out by Cochrane's executor in an assignment to Black of the Cochrane contract, and a substitution of Black for Cochrane to complete the second obligation of that contract, viz., to secure payment of the unpaid residue, and this assignment and substitution were approved by the Choctaw delegation. The substitution and assignment were dated November 8, 1866, and were witnessed by Luke Lea and Ward H. Lamon. The approval without date is made with the proviso that Black shall make the payments to Cochrane's executor, and other payments agreed upon, and is signed by Peter P. Pitchlynn. (Rec. p. 17.)

COL. TOM SCOTT.

On July 14, 1867, it was agreed that Colonel Thomas A. Scott should unite with Black in performing the agreed service, which was *to obtain an appropriation* of the unappropriated residue of the Senate award, and also *in making part of the compensation to Cochrane's estate for past services*, in consideration that Scott should receive part of Black's compensation.

Then Scott agreed to advance $75,000, in PART payment of Cochrane's past services, and Scott further agreed, not only to do what was "*right*," but also to do what was "*necessary*" to get an appropriation, and to "use all proper and lawful diligence to promote the payment;" and for this advance, and services indicated, he was to receive back his $75,000, and twice as much more besides, $150,000!

He was to get his $75,000 first "out of the first moneys received," and $150,000 for his services and "*risk on advances;*" while McPherson, executor, was to receive "in *further* compensation of Cochrane's *past* services $75,000." Black was to control the rest. So, it may be fairly said that Cochrane's past services were then estimated at $150,000, not only by the executor and Black, but by the delegates who approved Black's substitution.

Thirty per cent. of the $250,000 actually collected by the Choctaws would be $75,000, and it nowhere appears that anything on account of the collection was ever paid Cochrane, whoever else may have received a share.

Of the $75,000 paid by Scott, *Mrs. Cochrane got her share under the terms of her husband's will.* The executor accounted for one-half to Colonel Luke Lea, who, though not mentioned in the Cochrane contract, was acknowledged by the will to have an equal interest. And it will be observed that what was due, and recognized by this transaction in 1866–'7 *as due*, to Cochrane's estate was for *past services*—for services rendered by Cochrane in his lifetime, and briefly enumerated above—was compensation earned in his lifetime.

As to Black's and Scott's undertaking, the unappropriated residue of about $1,800,000 was all that the executor and Black and Scott were talking about, and all that Black and Scott undertook to do, and what they expected to be able to accomplish promptly *was to obtain an appropriation.*

This court will not be surprised that, great lawyer as he was, Jeremiah S. Black had reached the conclusion that the Senate award, obtained by Cochrane before the war, was an adjustment and settlement of the claim to which the faith of the United States was pledged.

With this conviction of the right and law of the matter, and with the aid of Colonel Thomas Scott, Judge Black may well have looked forward to speedy success, and Colonel Scott undoubtedly did. Scott played a high

stake in what was expected to be a quick game and lost. There was no provision for his repayment, except out of the appropriation which he and Judge Black were to obtain; if they got it he was to be repaid, and to have 200 per cent. bonus; if they failed to get it he would lose both the $75,000 and the 200 per cent. bonus.

By the decree of the court below Scott's executors got no part of the fund in court, but they have prosecuted no appeal to this court.

In 1874, nothing having been accomplished by Black, his substitution for Cochrane was annulled by the Choctaws, and it seems clear that Black had practically abandoned the matter some time before.

Ward H. Lamon.

So far as the testimony shows, Lamon had no connection with the Choctaw claims, except through Judge Black. The best that can be said for him is that he was associate successor or assignee of Black, and Black's venture with Scott was to obtain the appropriation for the unappropriated residue of the Senate award—about $1,800,000—and out of that his own compensation, Scott's, and that of everybody connected with him was to come.

Neither Black nor Scott—nor Black, Lamon & Co.—nor any of them, ever did obtain the appropriation. The Choctaws terminated Judge Black's authority in 1874, and Lamon's authority and right to compensation undoubtedly fell with it so far, at least, as it could be connected with Cochrane's estate.

If Lamon had any claim against the Choctaws and against McKee for services of that value he rightly recovered his $35,000 by decree in his own case, but this gave him no right in this cause as against Cochrane's estate.

John H. B. Latrobe.

At the time of making the arrangement with Black, Cochrane's executor knew nothing of any connection of

Latrobe with the case. Before long, however, he learned that Latrobe had been largely instrumental in obtaining the treaty of 1866, in which Cochrane was also active; that there was some sort of understanding between Cochrane and Latrobe about the future prosecution of Indian claims, and what undoubtedly most influenced McPherson and Black to come to an understanding with Latrobe was his avowed hostility to the proposed efforts to obtain the appropriation, unless he should be recognized and provided for.

Latrobe was a lawyer of ability and distinction; he had undoubtedly rendered valuable aid in the matter of the treaty of 1866, for which he had been paid, and he undoubtedly had formal authority to represent the Choctaws after that from the commissioners of the Choctaw Nation, who came on to negotiate the treaty of 1866, but not from the Pitchlynn delegation. Latrobe seems to have claimed no share in the compensation of Cochrane's past services, but Cochrane's executor, in ignorance of the fact that Latrobe had any right or power in the premises, had agreed with Judge Black to accept $150,000 in full for those past services, and had agreed that if Black got the appropriation he might keep for himself and his associates the balance of the 30 per cent. secured to Cochrane by the original contract and to Black by the substitution.

Something had to be done. Black realized that more harm could be done to him than to the Cochrane interest if Latrobe were not satisfied, and finally it was agreed that out of the moneys to be collected by Black, Lato be should have $75,000, of which Cochrane's executor should pay $25,000 and Black should contribute $50,000, but it was expressly agreed by and between this appellant, Cochrane's executor, and Latrobe that this $75,000 was payable out of moneys to be paid Cochrane's estate by Judge Black and *not otherwise*. So that whatever the merits of Latrobe's claim for services as against the Choctaws or as against McKee, he ceased to have any claim

or possibility of a claim against Cochrane's estate from the time that the Black contract was annulled. There never was anything which would have authorized Cochrane's executor to pledge any part of the amount due Cochrane for past services to Latrobe, except the emergency presented by the discovery of Latrobe's connection with the matter after he had in good faith entered into his arrangement with Black, and when Black agreed to meet the demand of Latrobe by supplying $2 for the executor's $1, he made this arrangement to avoid possibly larger liabilities, but was careful to confine his obligation to pay anything to Latrobe from moneys coming from Judge Black. Even if the amount, which Judge Black and Cochrane's executor promised Latrobe in the emergency which they had to meet, was a correct estimate of the value of Latrobe's services and not simply the best compromise they could make, it cannot help Latrobe in this interpleader suit.

If Latrobe did perform services to the value of $75,000 he had a claim against the Choctaws or against McKee, and he rightly recovered his decree in his own suit for $75,000; but this gave him no right in this case as against Cochrane's estate.

Ellen Cochrane.

As already seen, John T. Cochrane died testate in 1866, and named appellant John D. McPherson as his executor. There is no question as to the identity of the defendant Ellen Cochrane with the "Mrs. John T. Cochrane of Washington city, D. C.," mentioned in the McKee contract.

If the defendant Ellen Cochrane claims through her husband, she can only claim from the executor under her husband's will, which she has already ratified and accepted. She does claim in her answer as the widow of John T. Cochrane, and sets up her husband's services to the Choctaws.

McKee in his bill plainly shows that this 5 per cent. was intended as compensation for Cochrane's services, but he claims that the payment being directed to be made to Mrs. John T. Cochrane, the executor and she should interplead that, as between them, he might have a valid acquittance. His testimony as well as his declarations show that his real knowledge and belief was that this 5 per cent. was for Cochrane's services.

The provision of the McKee contract as to the 5 per cent. paid into court made it absolutely certain that the Indians intended and McKee undertook to pay this 5 per cent. for services rendered by Cochrane. The 5 per cent. is to be 5 per cent. of the 30 per cent. dedicated by the Indians in the McKee contract, as well as in all others, to the payment of attorneys.

The 5 per cent. is not to *given* to an individual named Ellen Cochrane, but Blunt and McKee are "*to pay to Mrs. John T. Cochrane* of Washington city, D. C." Cochrane had been dead about four years, and this designation of the payee was exactly equivalent to "*widow of John T. Cochrane.*"

Again, in the very same paragraph, separated only by a semicolon, and as part of the undertaking of Blunt and McKee, to whom the previous part of the contract had secured the whole 30 per cent., and without the specification of any persons or amounts, the contract continues: "And the said Blunt and McKee *further* agree to adjust the claims of all parties who have rendered service heretofore in the prosecution of said claim upon the principle of equity and justice *according to the value* of the services so rendered." Can anything be plainer than that the Choctaws had to their own satisfaction adjusted the claim of Cochrane for services in the prosecution of the claim; had fixed the value at 5 per cent. of the 30 per cent.; had confided the positive duty of paying that amount for those services to Blunt and McKee; and that Blunt and McKee had accepted this positive and definite duty? As

to all other persons who had claims for services rendered, Blunt and McKee assumed the duty of *adjusting* in the place and stead of the Indians or their delegation, *according to the value of the service so rendered.*

In the one case the claim was adjusted and the value fixed by the Indians themselves. In the other the adjustment and the ascertainment of value were not fixed by the Indians, but were to be ascertained by Blunt and McKee.

One more consideration must not be lost sight of. If the Indians or their delegates wished to make a present to Mrs. Ellen Cochrane, they would have given of their own, *i. e.*, of the Indians' 50 per cent. or the delegates' 20 per cent., and would not have attempted a gift of part of the 30 per cent., always dedicated to the payment of attorneys, and secured to Blunt and McKee by their contract. If McKee's contract had intended to provide for a gift to Mrs. Cochrane it was to be a gift from McKee and out of his 30 per cent., and he would have agreed to *give, donate, or present*, and not to *pay*, and would presumably have carried out his agreement and never have filed his bill of interpleader.

Indeed, it is not perceived on what principle the court below could have decreed the interpleader and discharged McKee, unless they held on a construction of the McKee contract, exhibited with the bill, that though Mrs. Cochrane was named, and was therefore properly a defendant, the terms of the contract did not import a gift to her, nor fasten on McKee a positive and paramount duty to Mrs. Cochrane.

The Decree Below.

The first error in the decree below was in decreeing the 5 per cent., or $147,057.63, "to be and to have been the property of Ellen Cochrane, John H. B. Latrobe, and Ward H. Lamon." (See third assignment of error.) How could this be?

If the 5 per cent. required by McKee's contract to be paid to Mrs. John T. Cochrane was a gratuity or donation to Mrs. Cochrane, it should have all been decreed to her.

If it was a gratuity to Mrs. Cochrane, on what principle could the court give part of this donation to Latrobe and Lamon?

If it was not a gratuity but a payment for her husband's services, none of it should have been decreed to Ellen Cochrane.

Following the sequence of the provisions in the decree, the next error is in the statement of the amount found to be due and payable to Ellen Cochrane, viz., the whole of the 5 per cent., or $147,057.63. (See fourth assignment of error.) This seems to be utterly inconsistent with the initial provision of the decree just noticed. The fund was the very 5 per cent. which McKee was to pay to Mrs. John T. Cochrane. This was settled for the court and for the defendants when the decree to interplead was made and McKee discharged, and yet the court begins by declaring the fund not only to be, but "to have been," the property of Ellen Cochrane, Latrobe, and Lamon, who are to be paid *pro rata*, and its very next declaration is that the amount due and payable to Ellen Cochrane is the whole 5 per cent. required to be paid to Mrs. John T. Cochrane, and the whole amount of the general fund paid into court. But reading on, we see the origin of the confusion and inconsistency just noticed. McKee had been discharged, and all the defendants had been enjoined not only from instituting but from prosecuting any proceedings at law or in equity against McKee in respect of this 5 per cent., but without prejudice to the right of any of them to proceed to recover any demands which any of them may have against him for amounts due over and above the money in court. The separate proceedings of Lamon and Latrobe did seek to recover such demands, and did seek to establish as

against McKee a trust with reference to a larger and a different fund over and above the amount paid into court. There never was even an attempt to have an order passed consolidating the causes by any of the parties, and the court did not stultify itself by making any such order of its own motion. And yet the court undertakes to consider what decrees had been that day passed against McKee in Lamon's and Latrobe's suits, and in spite of its injunction of October 1, 1889, gives Lamon and Latrobe the benefit of having done just what they were forbidden to do, viz., to prosecute proceedings in equity against McKee "*for the recovery of the said sum of money paid into the registry of this court by the complainant*, OR ANY PART THEREOF," and declares *in this cause* that Latrobe is entitled to $75,000 as the amount due and payable to him, and Lamon is entitled to $35,000 as the amount dne and payable to him, and that by reason of the decrees in their separate causes against McKee, who was no longer a party to the suit, they are entitled to have a decree in this cause against the fund for parts thereof. (See first, second, fifth, and sixth assignments of error.)

The next error is the denial of any right to Cochrane's executor to be paid out of the fund in court for Cochrane's services rendered in his lifetime. (See seventh, eighth, and tenth assignments of error.)

There is no possibility of denying the right of Cochrane's executor to any participation in this fund, except on the theory that the 5 per cent. was a gratuity to Mrs. Cochrane. If it was, the court should have so ruled at the outset and have dismissed the bill of interpleader on the ground that McKee, on the face of his bill and exhibits, owed a paramount and positive duty to Mrs. Cochrane which he could not evade. If it was, and the court only discovered it when making the final decree, it had no right to give part of Mrs. Cochrane's gratuity from the Indians and McKee to Latrobe and Lamon. This is the only theory on which anything could be awarded to Mrs.

Cochrane in this suit. (See ninth, eleventh, and twelfth assignments of error.)

If this was a payment for Cochrane's services rendered in his lifetime, the only theory on which the court could have denied to McPherson, executor, a decree for the whole of the fund would be that Latrobe and Lamon had established, in this suit, as against Cochrane's estate, the right to part of that compensation. But it has been shown above that whatever the value of the services rendered by those gentlemen in the prosecution of the Choctaw claims, their only rights as against Cochrane's estate grew out of Black's arrangement with the executor and the supplemental arrangement of Black and the executor with Latrobe; and that the Black contract was never fulfilled, but abandoned and annulled by the Indians; that Lamon never was to receive any money from Cochrane's estate, but only from Judge Black, and that the condition on which alone Latrobe was to receive any money from Cochrane's estate was never fulfilled. (See thirteenth and fourteenth assignments of error.)

In conclusion, it is submitted that the whole 5 per cent., or $147,057.63, should have been decreed to Cochrane's executor, who is a bonded officer acting under the authority of the Supreme Court of the District of Columbia holding an orphan's court, a man of substance and responsibility, who properly represents the legatees under the will of Cochrane and the Luke Lea interest acknowledged by that will. (See fifteenth and sixteenth assignments of error.)

In the present position of this case there is no question of the subsistence of any contract for 30 per cent. to be paid to Cochrane or his assigns. No question arises here as to the act of 1853. There can be no pretence that this suit is a suit against the Choctaw Nation. There can be no question that Cochrane did render faithful, valuable, and efficient service in his lifetime in the prosecution of these claims, and that there was a large sum actually due

him at the time of his death, earned by services in his lifetime.

There was a flimsy pretence made in the court below that Cochrane had been fully paid in his lifetime, based upon the testimony of Campbell Leflore, (Rec. p. —,) but an examination of that testimony will show that the witness had no knowledge of his own on the subject, could give no intelligent account of what the record showed, which he pretended to have examined, and made it clear that it does not tend even to prove that Cochrane was paid one cent by the Choctaws on account of the valuable and successful service in regard to the net proceeds claim. If he had been paid would Pitchlynn and the other delegates have approved the payment by Black of $75,000 cash and the promise of $75,000 more to Cochrane's estate in 1866–'7? If he had been paid would the delegates have required and would Blunt and McKee have agreed to pay 5 per cent. of their 30 per cent. on account of Cochrane's services? If he had been paid would not McKee have turned over to Mrs. Cochrane 5 per cent. as a gratuity and have given her the means to defend it; or if the same considerations which moved him to his declarations before he filed his bill of interpleader and caused the filing of that bill had existed and he had known that Cochrane had been paid in full in his lifetime, could he not have kept that 5 per cent. and defended it against all comers claiming under or against Cochrane? There is not a shadow of real support for this theory, and it is confidently submitted that the same court which upheld the Senate award, will see justice done to the estate of the man who obtained it.

GEO. F. APPLEBY,
CALDERON CARLISLE,
For McPherson, Executor.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894.

HENRY E. McKEE, Appellant,

vs.

WARD H. LAMON.

Term No. 224.

WARD H. LAMON and CHANCEY F. BLACK, Appellants,

vs.

HENRY E. McKEE.

Term No. 225.

JOHN D. McPHERSON, EXECUTOR, Appellant,

vs.

HENRY E. McKEE *and al.*

Term No. 291.

Appeals from the Supreme Court of the District of Columbia.

BRIEF AND ARGUMENT FOR WILLIAM H. MARBURY, ADMINISTRATOR OF JUDGE ROBERT ROSE, DECEASED.

STATEMENT OF THE CASE.

In the original bill of Ward H. Lamon and Chancey F. Black, the defendants named were McKee, McPherson, Ex'r of Cockrane, and James P. Scott and Mrs. Thomas A. Scott, executors of Thomas A. Scott, and in paragraph 25 of said bill, (p. 30, record,) the plaintiffs Lamon and Black state "that other persons than those above mentioned claim to have rendered valuable and important service in the prose-

cution of said claim." "Wherefore the plaintiffs ask leave, when they shall have discovered the said persons, that they may be allowed to make them parties hereto."

This bill was filed on 7th July, 1888; on the 21st July Robert and Mary Rose and B. Trueheart presented their petition setting forth the claim of Judge Robert Rose, deceased, and that they were his heirs and next of kin and had taken proceedings to secure administration so that a representative might be appointed who would take proper action. (Docket entry, record, p. 2.)

On 13th May, 1889, William H. Marbury, administrator of Robert Rose, deceased, by *leave of the court*, filed his petition. (Docket entry, record, p. 4.) This petition appears in full on pages 83-88, record, in cases 291 and *als*.

In the suit of *H. E. McKee* vs. *Ellen Cochrane* Rose's administrator filed also his petition setting forth that he had filed his petition in the cause of *Lamon* vs. *McKee*, and attaching a copy, and asked that his rights in the funds deposited in court should be protected. (Same record, pp. 81-2.)

Order allowing W. H. Marbury, admr. d. b. n., &c., of Robert Rose, decd., to file his petition.—Filed May 13, 1889.—R. J. Meigs, Clerk.

In the Supreme Court of the District of Columbia, sitting as an equity court.

Henry E. McKee, Complt., *vs.* Ellen Cochrane & Als.. Defts. } In Equity No. 11,262. Doc. 28.

On motion of W. H. Marbury, administrator d. b. n. of the estate of Robert Rose, deceased, by Mr. Willis B. Smith, his solicitor, he is allowed to file his petition in this cause.

W. S. COX, J.

Petition of Wm. H. Marbury, admr. d. b. n. of Robert Rose, deceased, and exhibits.—Filed May 13, 1889.—R. J. Meigs, Clerk.

No. 3,185. Admn. Doc. 14.

In the Supreme Court of the District of Columbia, holding a Special Term for Orphans' Court Business.

District of Columbia, *to-wit:*

The United States of America, to all persons to whom these presents shall come, greeting:

Know ye, that on the 6th day of September, in the year of our Lord 1888, administration of all the goods, chattels, and credits of Robert Rose, late of the District of Columbia, deceased, was, by the Supreme Court of the District of Columbia aforesaid, granted and committed unto William H. Marbury, the said William H. Marbury, as administrator d. b. n. of said Robert Rose, deceased, having first executed a bond to the United States, with good sureties approved by the said court, in the penalty of five hundred dollars, conditioned for the faithful performance of the trust in him reposed, and having also taken the required oath.

Witness, Alexander B. Hagner, justice, holding the special term of the said Supreme Court for Orphans' Court business, this 13th day of May, in the year of our Lord one thousand eight hundred and eighty-nine, and of the independence of the United States the one hundred and thirteenth.

Test: DORSEY CLAGETT,
Register of Wills for the District of Columbia.

[Seal Supreme Court of the District of Columbia, Probate Jurisdiction.]

In the Supreme Court of the District of Columbia, sitting as an equity court.

Henry E. McKee
vs.
Cochrane Et Als.
} In Equity No. 11,262. Docket 28.

To the Hon. Supreme Court of the District of Columbia, sitting as an equity court:

Your petitioner, William H. Marbury, administrator *de bonis non*, &c., of the estate of Robert Rose, deceased, respectfully states:

1st. That your petitioner is a resident of the State of Virginia, and that he files this petition in this cause as the administrator *de bonis non*, &c., of Robert Rose, deceased.

2nd. That he duly received letters of administration on the estate of said Robert Rose, deceased, on the 6th day of Sept., 1888, from the Supreme Court of the District of Columbia, sitting as an orphans' court, which he files herewith.

3rd. That the complainant, H. E. McKee, paid into court in this cause the sum of $161,197.06, being the sum of $14,140 due by act of the General Council of the Choctaw Nation of November 1, 1861, to John T. Cochrane, and the sum of $145,057.06, which was 5 per cent. of the Choctaw "net proceeds claim."

4th. That by a decree passed by this honorable court in the cause No. 11,238, docket 28, H. E. McKee was directed to pay into court "the sum of $136,500.00 without prejudice to any right or claim which the said complainants may have to the sum of $161,197.06 heretofore paid into court by the defendant McKee in equity cause No. 11,262, and said sum first mentioned shall be held as and for security for such persons as shall establish a claim thereto under the contract of John T. Cochrane with the Choctaw Nation of Indians, or his assignee, or their contract with Jeremiah S. Black.

5th. That by said decree, this honorable court took jurisdiction in said cause of all claims under said contract, known as the Cochrane and Black contracts, and the evidence bearing thereon has, by the parties to this cause, been introduced therein.

6th. That your petitioner has filed in said cause in equity No. 11,238, docket 28, his petition asserting his rights under said contracts; he files herewith a copy of said petition, and adopts its statements as if fully set out again in this petition.

Your petitioner therefore prays:

1. That he may be allowed to file herein this, his petition.

2. That he may be made a party defendant in this cause.

3. That his petition may be treated as an answer or cross-bill, if necessary.

4. That the complainant and the defendants may be required to answer its allegations, said answers under oath being hereby expressly waived. That your petitioner may be allowed to appear before the auditor to whom this cause may be referred.

5. That the said fund of $161,197.06 may be invested in some interest-bearing bonds, or other arrangement made by which interest will accumulate for the benefit of the parties interested.

6. That your petitioner may be paid his proper proportion of said sum to which he is entitled under the contracts and agreements set forth.

7. That all proper process may issue and proceeding be had, and all other and further relief be granted which the case may require or equity may suggest, whether specially asked herein or not.

And your petioner, as in duty bound, will ever pray, &c.

WILLIAM H. MARBURY,
Administrator d. b. n., &c.,
of the Estate of Robert Rose, deceased.
By WILLIS B. SMITH,
His Counsel and Solicitor.

WILLIS B. SMITH,
4½ N. 11th St., Richmond, Va.

In the Supreme Court of the District of Columbia, sitting as an equity court.

Ward H. Lamon and Chauncey F. Black
vs.
Henry E. McKee & Als.

In Equity No. 11,-238, Docket 28.

To the Hon. Supreme Court of the District of Columbia, sitting as an equity court:

Your petitioner, William H. Marbury, administrator *de bonis non*, &c., of the estate of Robert Rose, deceased, respectfully states:

1st. That your petitioner is a resident of the State of Virginia, and that he files this petition in this cause as the administrator *de bonis non*, &c., of Robert Rose, deceased.

2d. That he duly received letters of administration on the estate of said Robert Rose, deceased, on the 6th day of Sept., 1888, from the Supreme Court of the District of Columbia, sitting as an orphans' court, which he files herewith.

3rd. That heretofore, and before said letters were granted, the heirs and distributees, B. Trueheart and others, filed in this cause their petition asserting the claim of the estate of said Robert Rose, and the interest of said estate in the funds in controversy; special reference is made to said petition now by your petitioner, and its statements adopted in so far as the same may not be modified herein.

4th. That the Choctaw Nation of Indians having a just claim against the United States authorized their delegates, P. Pitchlynn, Israel Folsom, Dixon W. Lewis, and Samuel Garland to contract with counsel for the prosecution of said claim known as the "nett-proceeds" claim; and the said delegates entered into a contract with John T. Cochrane by which the said Choctaw Nation of Indians became bound to pay 30 per cent. of funds obtained in satisfaction of said claim to said John T. Cochrane, or his assigns, said contract being dated 13th February, 1855. All of which is fully set out in the complainant's bill and admitted by the defendant McKee in his answer. Said contract is on pages 14, 15, and 16 of Senator Dawes' report already filed herein and which your petitioner will also file, if necessary, herewith.

5th. That said Cochrane obtained an award by the Senate on the 8th of March, 1859, fixing a basis upon which the lands of the Choctaws were to be paid for and their value computed, and the Secretary of the Interior were directed to report the amount, and the said Secretary made a report on

the 8th day of May, 1860, showing thereby that there was due said Choctaw Nation $2,981,247.60, and in 1861 there was paid to the Choctaw Nation on account thereof the sum of $250,000.00. All of which is likewise fully set out in the complainant's bill and admitted by said defendant McKee, except as to said Cochrane's procuring and causing said treaty to be made. Said McKee admits, however, that said Cochrane aided in securing said treaty or rendered service preparing the case for presentation to the Senate.

6th. That the said Choctaw Nation allied itself to the Southern Confederacy, whereby it forfeited and lost all its rights under and by virtue of said treaty; and said Cochrane, in prosecution of the work required by his said contract, procured and negotiated a treaty relieving said Choctaw Nation from the effects of their said alliance. All of which is fully set out in the complainant's bill and admitted by said defendant['s] answer, except that said Cochrane is entitled to the entire credit of and for the procurement and negotiation of said treaty. Said defendant McKee admits that said Cochrane aided in procuring and negotiating said treaty.

7th. That in the year 1866, the said John T. Cochrane was stricken with mortal sickness, and desired to arrange for the interests of his family and the said Choctaw Nation that other lawyers should carry on and complete the work under contract, and with a view thereto persuaded his acquaintance and friend Judge Robert Rose, your petitioner's intestate, to take an interest therein, and the said Rose persuaded Ward H. Lamon, one of the complainants, to go with said Rose to see said Cochrane.

8th. That an arrangement was made by said Lamon and Rose with said Cochrane by which the said Rose and Ward H. Lamon, J. S. Black, and Chauncey F. Black, composing the firm of Black, Lamon & Co., should conduct the further prosecution of the case, and the interests of said Choctaw Nation and said Cochrane's family protected, and negotiations thereto were in progress when said Cochrane departed this life.

9th. That after said Cochrane's death his executor, John D. McPherson, on November 8th, 1866, in pursuance of this agreement and arrangement aforesaid, entered into a contract with said J. S. Black by which said J. S. Black was substituted in the place of said Cochrane, and said contract was assigned to him, he agreeing to pay an amount to be fixed thereafter to said McPherson as executor of said Cochrane, and the said assignment and substitution was approved by the delegates of the Choctaw Nation; that said contract is fully set out in the complainant's bill and has been introduced in evidence in this cause. See Senator Dawes' report aforesaid, page 17.

10th. That afterwards, on February 14th, 1867, the said J. S. Black and John D. McPherson as executor of said Cochrane and Thomas A. Scott, who agreed to pay $75,000 to said Black for said Cochrane's executor, the said John B. McPherson, entered into an agreement by which the 30 per cent. of said claim was to be divided as follows: First, $75,000 to said Scott, then all sums received to be divided *pro rata* on the following, to-wit: Scott, $150,000; McPherson, $75,000; Black for himself and other persons associated with him for their services, the balance, giving Black and others about $600,000 as the amount for prorating, and Rose's estate one-third of that, or $200,000, for prorating.

See Senator Dawes' report, pages 18 and 19.

11th. That at the time of these contracts and agreements made by said J. S. Black, and certainly as late as 1872, the said John S. Black, Chauncey F. Black, and Ward H. Lamon were engaged in the practice of law in the city of Washington, D. C., as partners under the style of Black, Lamon & Co.

12th. That your petitioner's intestate, Robert Rose, who has been a party to the original negotiations commenced with Cochrane in his lifetime, and whose acquaintance and former residence in the Southwest rendered him a valuable lawyer for the prosecution in such claims, was from the time

of said Black's contract with McPherson until said Rose's death associate counsel in the prosecution of the claim and devoted his entire and constant attention to it, and his estate is entitled to participate in the sums aforesaid recently paid, as hereafter mentioned, to H. E. McKee for counsel fees, if not by the contracts aforesaid, to the extent of what said services were reasonably worth, to a *quantum meruit*.

13th. That on the 10th May, 1869, he requested of Ward H. Lamon a statement of his interest therein, which was given in a letter of which below is an exact copy:

DEAR SIR:—You ask me for a statement of your interest in the net-proceeds claim of the Choctaw Indians pending before Congress for an appropriation of $1,832,640 under several treaties between said Indians and the U. S. Government. My understanding is that B., L. & Co. are to have twenty-five per cent. of the gross sum for their fee in said case and that you are entitled to one-third of their fee.

Respectfully, WARD H. LAMON.

ROBERT ROSE, Esq.
May 10th, 1869.

That this letter was written with the following printed on the reverse side:

Jeremiah S. Black of Pennsylvania. Ward H. Lamon of Illinois.
Chauncey F. Black of Washington.
Black, Lamon & Co., Attorneys and Counsellors at Law, corner Fourteenth St. and Penn. Ave., Washington, D. C.

That under and by virtue of a contract or pretended contract with the Choctaw Indians Henry E. McKee, the defendant, obtained a draft upon the Treasury of the United States, and drew therefrom the sum of $714,699.65 with interest thereon at 5 per cent. from 16th Dec., 1886, to June 29th, 1888, amounting to $783,763.82, which was 25 per cent. of the nett-proceeds claim, and $14,140 on another account, the other 5 per cent. making up the 30 per cent. under Cochrane contract, having been fixed and agreed to be paid to the counsel appearing in the Court of Claims and

the Supreme Court of the United States. McKee's aforesaid contract is on pages 3 and 4 of Senator Dawes' report aforesaid.

15th. That said McKee, after the complainant's bill was filed in this cause, paid into this court to the credit of the cause styled Henry E. McKee *vs.* Cochrane *& Als.*, one-fifth (which was 5 per cent. on amount appropriated by Congress for the Choctaw Indians), of the said $714,699.65 and interest, and the further sum of $14,140.00 without interest, which was to the credit of a different account.

16th. That thereafter, on the hearing of the motion for a receiver on the 31st July, 1888, the said McKee was directed to pay unto the clerk of this court the sum of $136,500.00, and it is further ordered that the said sum be held as and for security for such persons as shall establish a claim thereto under the contract of John T. Cochrane with the Choctaw Nation of Indians, or his assignee, or their contract with Jeremiah S. Black; and on the 17th of September, 1888, an attachment issued in this cause against said McKee for his contempt in failing to obey the order passed on the 31st July, 1888.

17th. The said Robert Rose died on the
1871, and letters were granted on 1871,
to John M. Rose of administration on said estate of Robert Rose. The said John M. Rose departed this life on the
and letters of administration *d. b. n.* were granted to your petitioner on said Robert Rose's estate on the
1888. And no payment or satisfaction of said claim or any part thereof has ever been made to said Robert Rose in his lifetime, or to said John M. Rose, as administrator of said Robert Rose, deceased, or to your petitioner.

18th. That H. E. McKee, the defendant aforesaid, claims that J. S. Black, about the year 1872, abandoned the prosecution of said claim; but this, if so, should not effect your petitioner's rights as the evidence hereinbefore introduced in this cause, especially that of Judge Weed, who is still counsel

for McKee, shows that Judge J. S. Black appeared as late as 1872 in the prosecution of the claim, and nothing done by Judge Black after the death of Judge Rose could deprive said Rose's estate of the rights in equity and justice to pay for his services. See also Senator Dawes' report aforesaid, page 105, "testimony of John J. Weed."

19th. That said Ward H. Lamon claims under an assignment a large sum, but, under the agreement aforesaid between him and Judge Rose by which, made after his assignment, he agreed that Black, Lamon & Co. were to have two-thirds and Judge Rose one-third of twenty-five per cent. of the gross proceeds of the claim, it is plain Judge Rose's estate is entitled to one-third of any sum realized, owing, or decreed to be paid on account of said assignment.

20th. That said H. E. McKee agreed to pay Martin W. Chollar one-third of the amount received after deducting expenses; and also agreed to pay unknown amounts to John J. Weed, Albert Pike, J. W. Denver, Shellabarger and Wilson, and the executor of Judge Cuppy, deceased, as appeared by the Exhibit A, herewith filed and prayed to be taken as part of this petition. The whole document is filed, the portions adopted as part of this petition are (second paper) McKee's contract with Chollar, pages 4 and 5 and (third paper) Weed's letter to LeFlore, pages 5 and 6.

21st. That the said parties aforesaid, Chollar, Weed, Pike, Denver, and Shellabarger and Wilson have either been paid or secured to be paid by said McKee, and all funds received by them or securities given are charged in their hands with a trust in favor of the parties entitled under the Cochrane or Black contracts aforesaid, owing to the fact that said Chollar, Weed, Pike, Denver, and Shallabarger and Wilson were present during the hearing of this cause, and participated therein either as counsel for McKee or as his witness, and knew that said McKee having answered in court, that he held these funds subject to the order of the court, was ordered by it to deposit said $136,500.00 to the credit of the court

and thereby the said funds were stamped in his hands with a trust in favor of your petitioner and others entitled to be paid on account of the Cochrane or Black contracts aforesaid. That this court by entertaining the motion for injunction and a receiver for the entire sum of $783,763.82 made it impossible for any one to acquire, with notice of these proceedings, any paramount claim to any portion thereof.

Your petitioner therefore prays that he may be allowed to file his petition in this cause and made a party complainant.

1. That said petition may be treated as an amended and supplemental bill or as a cross bill or that he may be hereafter allowed to file an amended and supplemental bill, or a cross-bill if necessary.

2. That all necessary inquiries may be ordered and accounts taken which may be necessary.

3. That H. E. McKee, Ward H. Lamon, and Chauncey F. Black may be made defendant to this petition and required to answer its allegations, said answers under oath being expressly waived.

4. That a receiver be appointed with full power to bring any necessary action or suit against the said Martin W. Chollar, John J. Ward, Albert Pike, J. W. Denver, Shellabarger and Wilson, and the executor of Judge Cuppy, deceased, or other parties to whom said McKee has paid or secured to be paid any portion of the funds drawn by said draft of $783,-763.82, and that said receiver be authorized and directed to pursue by legal proceedings said fund, and proceed by proper action to subject them or any property bought with said funds, or in which they have been invested by parties who had notice of the trusts aforesaid, or notice of the motion for injunction, or the motion for a receiver for the entire fund, or any other fact showing that this court had taken any jurisdiction of the funds aforesaid.

5. That your petitioner may be paid all the amounts due in the premises out of any funds realized in any way; and that decrees may be entered in his favor against H. E.

McKee and any other party or parties liable for the amounts due and which cannot be paid out of the funds under control of this honorable court. That reasonable fees be allowed your petitioner's solicitor and counsel.

6. That all proper process may issue and proceedings be had, and all other and further relief be granted which the case may require or equity may suggest, whether specially asked herein or not.

And your petitioner, as in duty bound, will ever pray, &c.

WILLIAM H. MARBURY,
Administrator d. b. n., &c.,
of the Estate of Robert Rose, deceased.
By WILLIS B. SMITH,
His Counsel and Solicitor.

Both of these petitions in the several causes were filed by leave of court by signed orders of Judge W. S. Cox.

On 13th July, 1889, written notice was given "Willis B. Smith, Esq., Solicitor for Defendant Rose," of the taking of deposition of Lamon and J. J. Weed (McKee's counsel then and now), by Lamon and Black by counsel; service was acknowledged by "Willis B. Smith, counsel for administrator of Rose." (Same record, pp. 155-6.)

The depositions were taken and counsel for Lamon and Black introduced testimony bearing on the Rose claim, and counsel for Marbury, administrator of Rose, cross-examined the witness Lamon, who admitted the handwriting of the letter filed to be his. This letter and the testimony clearly showed that Judge Robert Rose had, for satisfactory reasons, associated Ward H. Lamon and Judge Jeremiah Black with him in the matters, of which for reasons satisfactory to all parties, he surrendered control to them, taking an agreement in writing, under which, as is usual among lawyers, he was to have one-third of the fees. (Record, pp. 383-4.)

Cross-examination by Mr. Smith.

Q. (Handing paper to witness.) Look at that paper and see if that is your handwriting and your signature.

A. Yes, sir; that is my handwriting.

Mr. Smith. I offer that paper in evidence, and request that it may be copied into the record.

The paper was marked by the examiner as Exhibit O, and reads as follows:

"Exhibit O."

Jeremiah S. Black, of Pennsylvania.
Ward H. Lamon, of Illinois.
Chauncey F. Black, of Washington.

BLACK, LAMON & Co.,

Attorneys and Counsellors at Law, cor. 14th st. and Penn ave.

WASHINGTON, D. C., *May 10th, 1869.*

Statement of the interest of Rose, Black, Lamon & Co., in the Chocktaw Net-Proceeds Claim.

To be divided between said parties in three equal parts	$158,140
To be deducted from this in favor of Latrobe & Fulsom	25,000
One-third of this sum	$133,140
Gives to to Rose ($44,346)	44,346
Leaving balance to B., L. & Co	$88,794

(Endorsed on back of Exhibit O.)

DEAR SIR: You ask me for a statement of your interest in the nett-proceeds claim of the Choctow Indians pending before Congress for an appropriation of $1,532,640, under several treaties between said Indians and the U. S. Government. My understanding is that B., L. & Co. are to have twenty-five per cent. of the gross sum for their fee in said case, and that you are entitled to one-third of their fee.

Respectfully, WARD H. LAMON.

ROBERT ROSE, Esq., May 10th, 1869.

On 14th October, 1889, notice to take depositions was given to "Willis B. Smith, Esq., solicitor for defendants, Marbury et als.," and accepted by him as "counsel for W. H. Marbury, administrator of Rose." (Same record, pp. 222-3.) And the evidence showed Rose worked four years with Lamon. (Record, pp. 297-8; Hovey's testimony.)

In like manner Lamon and Black's counsel and other counsel in the two causes gave notice, which was accepted by the same counsel for W. H. Marbury, administrator of Rose.

On 11th January, 1890, Lamon and Black filed an amended and supplemental bill in which Rose's executor was named as a defendant (the original bill as aforesaid having provided for making new parties when discovered), and the court in its order allowing the amended bill aforesaid to be filed, provided that the testimony theretofore taken should be considered as if it had been taken after the filing of the amended and supplemented bills. (Record, pp. 194-198.)

In this state of affairs the rights of Rose's administrator have been uniformly recognized in the taking of depositions and other proceedings except when questioned by H. E. McKee, whose practice as a lawyer never reached higher courts than those of Arkansas justices of the peace.

On the hearing, counsel for Rose's administrator suggested that he did not expect the court to distribute the funds coming to Lamon between Lamon and Rose until it was finally adjudicated what Lamon would receive; and asked in view of the proposed appeal to the Supreme Court that the court would let it appear that the questiou as to Rose's administrator's right to one-third of Lamon's recovery might be left distinctly open.

This was done, the court saying, "Court, you will have the right to proceed against Lamon hereafter." (Record, p. 242.)

POSITION IN INTERPLEADER SUIT.—M'KEE VS. COCKRANE AND ALS.

In this cause the plaintiff, when he deposited the

$161,197.63 in the registry of the court filed his bill, in which he says, after mentioning various claims to the money in a separate paragraph, that there are other parties whose names are unknown to him who claim portions of the funds, and he prays leave, when their names and the character of their claims is known, to make such parties defendants and that process may issue against them. (Record in case 291, p. 6.)

This bill was filed 19th July, 1888, and afterwards, on 13th May, 1889, William H. Marbury, administrator of Robert Rose, deceased, by leave of court, order signed Judge W. S. Cox, filed his petition showing his claim, showing he was entitled to one-third of any moneys coming to W. H. Lamon or C. F. Black.

He also prayed that he might be made a party defendant, and that his petition might be treated as an answer or cross-bill if necessary, and that the funds might be invested in interest-bearing securities and for general relief.

This was the first request to the court for the proper investment of the funds, and shortly afterwards it was made.

ASSIGNMENT OF ERRORS AND SUGGESTION TO THE COURT.

The petitioner unites in all the assignments of errors made by Ward H. Lamon and C. F. Black.

As to his claim to receive one-third of all found due to them or to either of them, and especially to one-third of the amount decreed in the lower court in favor of Ward H. Lamon, the petitioner asserts that the true construction of the decrees in the lower court, and the expressions of the judges therein, is that it is proper to take up and decide the questions between Rose's administrator and Ward H. Lamon's administrator and C. F. Black, when, and when only, the amounts due to Lamon and Black, and to each of them are finally fixed and ascertained.

No provision was made for this in the lower court, as it

was stated and clearly understood by all parties that it was useless to pass upon questions as to the distribution of Lamon's money until it was ascertained what Lamon would get.

But under the circumstances set forth counsel would respectfully submit and suggest that at the foot of the final decrees in favor of Lamon or Black the payment of one-third should be retained in the registry of the court as to moneys deposited therein, and as to other funds one-third should be required to be so deposited: all to await a decision either in this court or the lower one.

This it is believed is the usual and proper course in such interventions.

Judge Rose was a lawyer of high character, the chosen associate of Judge Jeremiah S. Black, and his record in this case, equally with that of his distinguished associate, is clear and unsmirched, as was his character in Virginia, New Orleans and California and the ermine which he had worn.

His representative asks that his right to fees justly earned by four years' work, and due by written agreement with his associates, be paid at the proper time, or at least that the decree shall provide for a prompt adjustment of the matter.

Counsel would respectfully suggest that, as lawyers are officers of the courts, this Honorable Court will, by proper explanations or modifications of the decrees, protect the interests of the family of the deceased, if it can be done, even if there had not been any intervention and diligent prosecution of the claim and assertion of his rights in the trust funds in controversy.

The fact that in order to a speedy decision in this Honorable Court the chief litigants waived the usual reference to an auditor, should not prejudice the rights of the intervenor, who had taken the usual steps by filing his petition by leave of court, and had proved his claim by presenting the written evidence to the examiner, who, in accordance with the notice given to the intervenor's counsel, was taking the deposition of the witnesses.

Recent decisions in this Honorable Court, as in most of the appellate courts of this country, seem to hold that intervenors are not in a full sense parties or necessary parties, yet they equally hold that their rights will be carefully protected in the lower and appellate courts.

In railroad foreclosures, as in this case, involving the control and distribution of large amounts among various parties, this seems now to be the settled rule.

Even if Lamon's amended bill had not named this intervenor, as a party, the court can, as was done in the case of *Anderson* vs. *Watt*, 138 U. S., p. 694, for purposes of justice, treat him as such.

WILLIS B. SMITH,
Counsel for William H. Marbury,
Administrator of Robert Rose, deceased.

MAR 7
JAMES H. McK

IN THE

Supreme Court of the United States.

JOHN D. McPHERSON, Executor of JOHN T. COCHRANE, Appellant,
vs.
HENRY E. McKEE and others.
} No. 291.

Appeal from the Supreme Court of the District of Columbia.

Brief for McPherson, Executor of Cochrane.

GEO. F. APPLEBY,
CALDERON CARLISLE,
For McPherson, Executor.

Pearson Printing Office, 9th & D Sts.

IN THE

Supreme Court of the United States.

JOHN D. MCPHERSON, Executor of JOHN T. COCHRANE, Appellant,
vs.
HENRY E. MCKEE and others.
} No. 291.

Appeal from the Supreme Court of the District of Columbia.

Brief for McPherson, Executor of Cochrane.

The Proceedings Below.

The appellee, McKee, filed in the equity court below a bill in the nature of a bill of interpleader, No. 11,262, on July 19, 1888, against Ellen Cochrane, Luke Lea, James Gilfillan, John A. Rollings, James P. Scott, Anna D. Scott, and Marion Bickley, executors of Thomas A. Scott; John D. McPherson, executor of John T. Cochrane; Chauncey F. Black, Ward H. Lamon, John H. B. Latrobe, Charles Stettauer, and William D. Jacoway, administrator of Benjamin J. Jacoway, and therewith made a tender to bring into court two certain sums of money of the Choctaw Nation, being respectively $147,057.63 and $14,140, to which he asserted no claim, but averred that in the said moneys he had no property interest in his own right, and prayed that the said above-named defendants might set forth and discover what right and title they and each of

them claim or have in and to the said moneys, and how they and each of them derive and make out their respective claims thereto and to each part thereof, and that to this end the said defendants may interplead as to their respective rights in and to the said fund.

The court below on the next day, July 20, on motion of complainant, directed the said moneys, aggregating $161,197.67, to be paid into court and to the clerk thereof, subject to such orders as the court may make in respect thereof and to the final decree of the court in said cause. The defendants to his said bill duly answered, and on May 24, 1889, an amended bill was filed by the complainant, so as to make it a bill of interpleader. Luke Lea was omitted as a defendant (p. 102, Rec. 291) to the amended bill. This appellant filed an answer on May 28, 1889, (p. 122, Rec. 291,) which claims the general fund of $147,057.63 and avers that the $14,140 was subject to no bill of interpleader, and the exhibit (p. 128) shows that the complainant, declaring that the said sum was paid into court by inadvertence, was then willing to rectify the error as far as he could, by assenting to a decree for its payment to McPherson, and that Mrs. Cochrane herself also thereto assented, which assent conformed with her answer to the original bill, (p. 28, Rec. 291,) and this answer to the amended bill was the basis of this appellant's contention in said court touching both funds—the $147,057.63 and the $14,140. Answers by the other defendants to said bill were filed, and other proceedings had, and on October 1, 1889, the court below at special term decreed (pp. 149 and 150, Rec. 291) that the said bill of interpleader was properly filed; and that the defendants interplead and settle and adjust between themselves their respective rights or claims to the money paid into the registry of this court by McKee, the complainant. The court further decreed that McKee be dismissed as a party to the suit, and that the respective answers of the defendants filed in the cause be and are taken and con-

sidered as such interpleading, and perpetually enjoined the defendants from proceeding at law or in equity against McKee.

This appellant, John D. McPherson, executor, appealed to the general term in open court from so much of the decree as enjoins him from proceeding at law or in equity as to the $14,140, and from so much of the decree as directs him to interplead with the other defendants as to said sum of $14,140. (p. 150, Rec. 291.) Appeals were taken by other defendants, and on December 4, 1889, the appeals of this defendant and of the others were dismissed by the general term, (p. 284, Rec. 291,) and the case was remanded to the equity court for further proceedings. A great deal of testimony was taken. A special reference to C. Ingle, examiner, to take testimony as to the rights of the defendants to the fund of $14,140, was made. (p. 148.) From the order making such reference an appeal was taken by several defendants but was dismissed. And this smaller sum of $14,140, instead of being immediately paid to this appellant as demanded, was ordered to be invested in like manner as the larger sum of $147,057.63 had been theretofore ordered to be invested. (pp. 151 and 283, Rec. 291.)

On September 15, 1890, the case was certified to the general term to be heard there in the first instance. (pp. 843 and 844.) And on May 28, 1891, the general term passed its final decree, (p. 1283, Rec. 291,) awarding one-half of the fund of $14,140 to John D. McPherson, executor, and the other half of that fund to Rollings, Gilfillan, and Maxwell, and decreeing that the general fund of $147,057.63 was the money and property of Ellen Cochrane, John H. B. Latrobe, and Ward H. Lamon, and that it should be divided, distributed, and paid out to the said defendants or their solicitors *pro rata*. The said parties were decreed to be entitled as follows: Mrs. Cochrane, $147,057.63; John H. B. Latrobe, $75,000; and Ward H. Lamon, $35,000. The claims to said fund asserted by

the executors of Thomas A. Scott, by Charles S. Stettauer, Chauncey T. Black, and William G. Jacoway were denied and their claims dismissed, and the decree provides "that the claim of the defendant, John D. McPherson, as executor of John T. Cochrane, deceased, to be paid out of the general fund of $147,057.63 for professional services rendered by John T. Cochrane in his lifetime and for expenses incurred by said executor, be and the same is denied, from which denial the said John D. McPherson, executor, in open court prays and is allowed his appeal to the Supreme Court of the United States." (pp. 1284 and 1285, Rec. 291.) McPherson's bond was approved in this court. (p. 1287.)

Mrs. Cochrane took no appeal. The only appeals taken in the interpleader case were that of this appellant, No. 291, and that of Gilfillan et al., No. 203.

The Case.*

John T. Cochrane, of Washington, D. C., was employed by the Choctaw Nation of Indians under a written contract made February 13, 1855, by Peter P. Pitchlynn, Israel Folsom, Dixon W. Lewis, and Samuel Garland, delegates duly appointed by an act of the Choctaw Council, approved on the 10th of November, 1854. By this written contract Cochrane was obligated to do two things, viz: 1st, to urge and prosecute all the unsettled claims and demands of the Choctaw Nation upon the United States before any of the departments or officers thereof,

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* N. B.—In the following statement of the case references are made to the testimony of Albert Pike, J. B. Luce, James W. Denver, and others, found in the report of the Senate Committee on Indian affairs by Mr. Dawes, printed in the Record herein, pp. 928 to 1142. The testimony of these witnesses before the committee was taken down stenographically and that fact was proved by James L. Andeau (Rec. p. 846) and by Senator Ingalls (Rec. p. 864), and the Dawes report with this testimony was introduced in evidence without objection and after notice to counsel for all parties. (Rec. p. 845.)

and if necessary before Congress, and especially the claim of said nation arising under the treaty of Dancing Rabbit Creek, of September 27, 1830, to the net proceeds of land ceded to the United States by that treaty; and, 2d, to do his best and utmost to obtain payment of said claims and demands, and in all things appertaining thereunto to represent faithfully said nation, and guard its interests and strive to enforce its rights at his own cost and expense. Cochrane had been representing it for three years in other matters, such as the prosecution of its claims for arrearages of annuities and school moneys, and his services in its behalf were of the most laborious and valuable character in placing said matters upon a proper basis and in a favorable train of adjustment, as appears by a preamble in the said contract, explaining a prior agreement between the nation and Albert Pike, and the delegates, as further appears in the said contract, were empowered by the nation to take all measures and to enter into all contracts which, in their judgment, are or may become necessary and proper in the name of the Choctaw people to bring to a final and satisfactory *adjustment and settlement* all claims or demands whatever which the Choctaw tribe or any member thereof have against the government of the United States, by treaty or otherwise. It seems that Cochrane had shown "zeal, energy, and faithfulness" in the matters theretofore prosecuted, and that the delegates considered it necessary for the interests of their nation that all business connected with said claims and demands of their nation should be under his exclusive control and management. (*Vide* contract, pp. 13 and 14.) The foregoing, also, shows that Cochrane was taken into all the business of the Choctaws, such as the relinquishment fund, the eastern boundary, the school fund and the arrearages of annuities and the net proceeds.

Cochrane succeeded in the first thing obligated to be done, so far as the net proceeds claim is concerned. He

brought it to a final and satisfactory adjustment and settlement, and thus earned his compensation. Both the parties to the contract so thought. The delegates, in their report to the Council, dated October 23, 1861, say (p. 923) "that after a long trial in the prosecution of Choctaw claims arising under the treaty of 1830, concluded at Dancing Rabbit Creek, between the United States and the Choctaw Nation, they have at last succeeded in the recovery of the sum of $2,332,560.85. This sum of money would have been duly arranged for its disbursements by the late session of Congress, thereby meeting the requirements of the twelfth article of the treaty of 1855, June 22, were it not for the exhausted state of the treasury of the United States at the time it was under consideration, as well as the threatened collision of the forces of the Northern and Southern armies, which was then fully anticipated it would take place. To prove this we would state that the Senate of the United States was willing to pay, and did pass a bill appropriating the sum of $1,250,000 as an advancement on the amounts found to be due the Choctaws, but the House of Representatives curtailed the Senate appropriation down to $500,000, it being the effect of a conference had on the subject by the two houses of Congress. Nevertheless, when Congress made the above appropriation of half a million of dollars, it was understood to be only as a part payment on the original amount, as above stated. In other words, Congress allowed the claim of the Choctaws, and appropriated a half million of dollars as part payment, the remaining amount to be settled when in funds. So we view the case in point to be an admitted fact that it has been decided in favor of the Choctaws, and the services of the delegates are no longer required, so far as the prosecuting the claim above referred to is concerned. It only needs now the appropriation to be made to close the whole matter." This report of the Choctaw delegation is signed by P. P. Pitchlynn, Israel Folsom,

Samuel Garland, and Peter Folsom, who was the successor of Dixon Lewis, deceased. (p. 684.) That Cochrane himself thought that his compensation had been earned is shown by his will, (Rec. p. 48,) wherein he says: "I give and bequeath *my* interest in a certain contract which I have with the Choctaw Indians, and *the amount due me thereon*, to my executor, hereinafter named, upon trust *to collect the amount due thereon*, or to sell, assign, or compromise the same," etc. "I acknowledge an equal interest in the Choctaw contract, hereinbefore mentioned, to belong to Col. Luke Lea."

Cochrane in his contract with the delegates agreed that his payment when earned should be limited to or paid out of the moneys received by the Choctaws on account of the services rendered under his contract, and the delegates solemnly and irrevocably pledged the nation's faith and honor as well as their own, and in the name of the nation covenanted to pay to Cochrane, his heirs or assigns, thirty per centum of every and all sums of money obtained by and paid to said nation or individuals thereof for and on account of any or all of said claims; and by the said delegates it was further agreed that the Choctaw Nation by said contract does authorize and empower the agent of the United States for the Choctaw Indians or any other person into whose hands any money due and payable to the Choctaw Nation shall come on account of any or all said claims, on the demand of the said Cochrane, his heirs or *assigns*, to pay over to him or them thirty per centum thereof, and on production of a receipt therefor from the said Cochrane, his heirs or assigns, then that the said Choctaw Nation shall and will forthwith give to the said agent or person having said money for disbursement good and sufficient vouchers therefor to pass said payment at the settlement of his accounts in Washington.

Cochrane, by the second obligation in his contract, merely bound himself to do his best and utmost to obtain payment of said claims at his own cost and expense.

The record shows that he did do his best and utmost. His own interest required that much, because he had already undertaken the first obligation with the understanding that what he should earn for any services should await payment to the Choctaws of the claim adjusted. The Indians gave 20 per cent. to the delegates as their compensation, making, with Cochrane's 30 per cent., half of the whole amount to be recovered by the Indians. (Rec. pp. 514, 684, 919, 926, 1161.) When the delegates made the contract in 1855, they also made a contract for their own compensation, (p. 684,) and it was then understood when they made the contract with Cochrane that Cochrane represented several other persons in interest with himself. (So says the Principal Chief of the Choctaw Nation in special message to the Choctaw Council, but McPherson did not know this when he became executor of Cochrane.) Pitchlynn himself knew it well, and knew the amounts, according to Pike; the amounts were in five per cent. divisional parts: Cochrane, 5 per cent.; Luke Lea, 5 per cent.; Pitchlynn, 5 per cent.; Pike himself, 5 per cent.; two persons controlled by him, each 5 per cent. (pp. 1010, 1016.) The Supreme Court of the United States gave judgment for the amount of the award of the Senate, which confirms the opinion of both parties to the contract stated *supra*, that the claim prosecuted by Cochrane was adjusted in his lifetime. That award made the government of the United States liable for the amount finally recovered by the Choctaw Nation, and of this amount 30 per centum was to be paid to Cochrane, if alive, or to his heirs or assigns. His sister, Mrs. Magruder, was an heir and probably sole heir, and his executor, John D. McPherson, was his assign. Pitchlynn and Pike, at that time both enemies of McPherson, because the latter felt forced to recognize Latrobe's authority under a delegation not comprising Pitchlynn, (p. 683,) thought that Cochrane's five per centum should be paid to the widow and sister of John T. Cochrane. (Rec. p. 1019.) Pike and Pitchlynn had frequent interviews on the subject.

In the answer filed herein by W. Hallett Phillips, solicitor for James P. Scott, (p. 39,) it is averred that Mary A. Magruder, sister of Cochrane, was then long since deceased. If she were then deceased—a fact which we are willing to admit, although in the cross-bill of Rollings and Gilfillan, afterwards filed herein, she is made a defendant thereto, though no party to the original bill, and is described to be a resident of the District of Columbia—Pitchlynn had to provide only for the widow when he afterwards made the clandestine contract with McKee alluded to *infra*, and it was at Pitchlynn's instance, says McKee in his testimony, (p. 351) that the five per cent. provision for Mrs. John T. Cochrane (who is Ellen Cochrane, widow) was made, and which provision required him to pay Mrs. John T. Cochrane, of Washington city, D. C., five per centum from the thirty per centum before referred to, whenever he should receive the same, thus showing, according to Pitchlynn, that in his opinion John T. Cochrane had earned his so-called five per centum interest. In an interview with McKee, had with Mr. Calderon Carlisle, McKee spoke of the five per cent mentioned in his contract as the proportion allowed by the Choctaws for Cochrane's services, (Rec. p. 876,) and McKee also stated that "the putting in the widow of John T. Cochrane" was an idea of old Peter Pitchlynn, who thought that such a provision would prevent the necessity of the fund going to the probate court. (Rec. p. 877, Carlisle's testimony.)

Campbell Leflore (p. 1039) testified: "Who made the contract with McKee to prosecute the claim? Colonel Pitchlynn. He was the operative man in the delegation for a number of years, and those contracts were generally made by him. Cochrane had always been regarded as a party whose interest and supervision of the claim was perpetual, and it was perpetuated by McKee, as I understand it." Campbell Leflore was the successor of Pitchlynn as a Choctaw delegate.

McKee's counsel, J. J. Weed, wrote a letter to Campbell Leflore at the request of McKee, (p. 226,) in which he says (p. 225): "The only attorneys who have rendered services in the presentation of the net proceeds claim or who pretended to have rendered such service and are not named in McKee's contract, are as follows:" . . . Here follows a list and among the attorneys named are John T. Cochrane, and touching him he says: "Mr. McKee agrees in his contract to pay to the widow of John T. Cochrane, deceased, five per cent., and I understand this agreement is satisfactory not only to Mrs. Cochrane, but to Mr. Cochrane's executor." This last statement is clearly inaccurate, to use a mild term. He also names John H. B. Latrobe, and says: "He looks to Mr. McPherson, executor of Mr. Cochrane, for his fee. Whatever sum Mr. Latrobe or Mr. Cochrane's estate gets, comes out of Mr. McKee's thirty per cent."

McKee told Mrs. McDonald (p. 603, see her testimony): "I will pay over the five per centum to Mr. Cochrane's executor;" and (p. 604) she testifies that McKee, about a week before the money was drawn out of the Treasury, promised that the five per cent. should be paid to Cochrane's executor, because he was a bonded officer, and that she would get her part when the money was paid over to Cochrane's executor, and that he believed Mr. Carlisle represented McPherson's executor.

Mr. Joseph K. McCammon testifies (p. 750) that McKee, when his attention was called to his contract about the five per cent. being payable to Mrs. Cochrane, stated that "it was put there for convenience, and that there would be no trouble whatever from Mrs. Cochrane, that he represented her, and that he would take care of her if the rest of us would agree upon a decision." That McKee, also, said that Mrs. Cochrane would be perfectly willing to take a small amount.

Mr. John S. Blair testified: "McKee (Rec. pp. 754 and 755) said that 5 per cent. (referring to the 5 per cent.

in his contract) was intended by the Indians to compensate for Cochrane's services, and to go to the people who were entitled to the benefits of the Cochrane contract. We objected to being confined to that 5 per cent., and never in the course of the discussion did we admit for a moment that we were circumscribed by its limitations, but we did insist that McKee was not dealing fairly with us in saying that he would not pay us out of the 20 per cent., which by the terms of the contract was in his hands for the purpose of adjusting and settling all claims for services prior to 1870, and confining us to a 5 per cent. which was not expressly devoted to that purpose, but which apparently was a donation to Mrs. Cochrane. To this he replied that he knew what he was talking about; that he and Peter Pitchlynn had discussed the matter in 1870, at the time the contract was made, and that it was well understood between them that it was not intended as a gratuity to Mrs. Cochrane; that Mrs. Cochrane had already received a considerable sum of money which had come directly from Mr. Scott's hands. We were anxious to avoid litigation, and we insisted on giving some bonds to indemnify him. . . . He refused that, saying, &c. . . . We said to him in the view which you have expressed of Mrs. Cochrane's rights under this agreement, you should have little fear of the result of litigation instituted by her. His reply, in substance, and I almost give his language, was that in making the contract and using her name he had done it without her consent or knowledge; that he regarded himself as controlling the situation so far as she was concerned; that he was in conference with her and authorized to act for her, and that if all the parties claiming compensation under the Cochrane contract would agree he would take care of Mrs. Cochrane, and that he thought a small sum would be sufficient. I have on my mind an impression that $10,000 was mentioned. I know that $10,000 has been mentioned at some time or other as the figure, but I do

not now remember that McKee mentioned $10,000. He said that he could readily dispose of the small interest she had, and that interest consisted in the fact that her name was there, and she might make trouble in litigation. I remember asking McKee why, in view of the purpose of Mr. Pitchlynn and himself, as expressed at this interview, they had used language that was capable of another interpretation. His reply was that Pitchlynn had a dislike or a reluctance to have the matter go through the orphans' court, and he thought that it could be adjusted better, and that the parties could get their rights better by using the name of Mrs. Cochrane than that of the executor." The last interview Mr. Blair had with Mr. McKee was between the drawing of the money from the Treasury and the filing of the bill of interpleader. (p. 756.)

Mr. W. Hallet Phillips, in his testimony, (pp. 744 to 747,) corroborates Mr. Blair, and positively states that McKee represented that he was acting for Mrs. Cochrane, and that she would be satisfied with $10,000.

Pitchlynn's will (p. 805) shows his peculiar antipathy to the probate court, as stated by McKee to Mr. Blair and to Mr. Carlisle. It also shows that the $14,140 was money due the *Choctaw delegation, and a part of their* 20 *per cent. outside of the* 30 *per cent. due Cochrane.*

Pitchlynn's will is witnessed by McKee.

McKee, when confronted on the witness stand with this clear, unequivocal testimony of Mr. John S. Blair and Mr. W. Hallet Phillips, made replies which were anything but clear and unequivocal. (Rec. pp. 416–419.) After stating on page 419 that he told the committee in Congress in 1887 that the heirs and representatives of Cochrane were looking to him and Mr. Luce to take care of them, he testifies (p. 420) as follows:

"Q. 620. By whose advice did she (Mrs. Cochrane) employ counsel? A. I can't tell you about that.

"Q. 621. By yourself? A. I don't know; I didn't see her, and, therefore, I didn't give her any advice.

"Q. 622. Did you advise her directly or indirectly to employ counsel? A. I don't remember; but I think my recollection is that her niece came to see me when she got service in that suit in this court, and said that her aunt would not employ counsel without my knowledge or something of that sort, and wanted to know whether she should, and my recollection is that I told her that it was absolutely necessary that she should have counsel, and advised her to select a good lawyer.

"Q. 623. Did you suggest whom she should employ? A. I don't think I did.

"Q. 624. Don't you know that you advised her to employ General Henkle? A. I am not sure about that; I may have done so; probably did; don't know."

When her answer was filed October 2, 1888, no solicitor or counsel signed his name thereto. (Rec. pp. 26 and 29.) When a motion to pay her $10,000 out of the money in court was filed July 1, 1890, the solicitor's name is omitted, (p. 818,) but the notice to take testimony on June 18, 1890, is signed by S. S. Henkle as attorney for Ellen Cochrane. (Rec. p. 819.) This notice was not filed till July 9.

And see what J. J. Weed, one of McKee's counsel, who testifies in behalf of Ellen Cochrane, says in his cross-examination by Col. Totten, (pp. 827, 828,) and also, in his cross-examination by Mr. Carlisle, (pp. 835 to 837.) Mr. Weed is the same person who wrote to Campbell Leflore, the Choctaw delegate, a letter dated February 12, 1888, beginning: "Mr. McKee has suggested to me that the Choctow Council might desire some assurance from the other attorneys who have claims against the net proceeds claims for services alleged to have been rendered by them of their willingness to trust McKee for their money, and not annoy and harass the Choctaws with claims and suits if he, McKee, should fail to settle with them to their satisfaction," and names McPherson, Cochrane's executor and Cochrane's widow, John H. B. Latrobe, Ward Lamon as being satisfied with McKee's contract, &c., when the testimony shows that none of them knew of McKee's contract until long after it was made and

were always antagonistic to it. Read the whole of Weed's letter, Rec. pp. 93 and 94.

The McKee contract, clandestinely made so far as all the parties claiming compensation through Cochrane are concerned, is found on Rec. pp. 8 and 9. It is signed by Pitchlynn for himself, and by himself as attorney in fact for his co-delegate, and by Blunt and McKee, in presence of Pitchlynn's son-in-law, Lombardi, and McKee's attorney in fact, Martin W. Chollar, and purports to be signed July 16, 1870, although Pitchlynn in his testimony given May 30, 1872, says all his contracts had run out by expiration of time. (Rec. pp. 399 and 400.)

There was no time limit in the Cochrane contract, so Pitchlynn did not refer to that. Mr. McPherson had transferred to Judge Black the whole of Cochrane's 30 per cent. fee. Pitchlynn approved of this, excepting that he limited Judge Black to 30 per centum of the *residue* of the Choctaw claim *unappropriated*. The record shows that Pitchlynn was interested personally in the part of the half million dollars already appropriated.

Mr. McPherson testified before the Committee of Indian Affairs, in March, 1872, that he knew nothing whatever of the Choctaw claim until after the death of Cochrane, when he became executor, and did not know until more than six months after Mr. Cochrane's death that the fee of Cochrane, whenever he obtained it, was to be divided, (pp. 1111 and 1115,) and when he made the transfer to Judge Black he supposed nobody had any claim upon it, (p. 561,) showing he did not then know about Latrobe's interest. The will made known to everybody that Luke Lea had an equal interest with Cochrane, and Luke Lea was an attesting witness to the transfer to Black. When Mr. McPherson afterward became satisfied that Latrobe had an interest, he with Judge Black amicably arranged the matter, and he was merely carrying out an agreement made by Cochrane in his lifetime. (See his deposition on behalf of Latrobe, p. 561.) In fact, the sale

of the contract was in pursuance of such an agreement between Cochrane and Black. (p. 870.) Pike says (p. 1019): "With the assignee of Lea, Pitchlynn had some understanding. I don't know what. I only know that he intended to pay him something. McKee paid him nothing." (See Rolling's testimony, p. 851.)

Mr. McPherson's letter to Gilfillan, dated "Stuttgart, January 9, 1887," (p. 865,) probably influenced the court below to allow to the assignees of Luke Lea one-half of the special fund of $14,140, which Mr. McPherson has always contended was not a part of the net proceeds claims. If it were, by McKee's contract the Indians have been forced to pay more than the 30 per centum which the Indians dedicated to the attorneys. Mr. McPherson's contention seems to be supported by Pitchlyn's will, (Rec. p. 807,) which shows that it was a part of the $84,394.63 due the delegates before November 1, 1861. It was not shown by Luke Lea's assignees to be a part of any other fund in which Luke Lea had an interest, or that their assignment covered Luke Lea's interest in other contracts than the net proceeds. Mr. McPherson wrote also from Stuttgart, Germany, a letter to the chairman of the Committee on Indian Affairs, United States Senate, in which he says (p. 872) that he was abroad for his health, and states: "I cannot at this time undertake to say what portion of the fund should, in view of all the facts above stated, be claimed by me as executor of the deceased. Certainly it can be nothing short of the amount which Judge Black was to pay me on the success of the claim; and whether I should not receive the whole percentage stipulated in the contract and account to Judge Black's representatives, upon equitable principles, for their share, is a question which I must consider and decide with the advice of counsel who will represent me before your committee. On the other hand, I do not claim to be exempt from all contributions towards the expenses of prosecuting the suit in the Court of Claims, should the latter

view be adopted." He wrote this letter, as he says therein, (p. 872,) solely from memory, and had no business papers. The expenses in the Court of Claims came out of Luce's 5 per cent., and according to Luce, in his testimony, (p. 1020,) he was on an equal footing with Cochrane. The Court of Claims was established February 24, 1855, (Vol. X Stats. at Large, p. 612,) after the date of the Cochrane contract.

Mr. J. W. Denver, who was employed by Pike, assented to Weed's letter to Campbell Leflore to be paid out of McKee's 30 per cent., (p. 693,) and says that General Pike was entitled to 5 per cent. of the net proceeds fee. (pp. 1035, 1036.) Latrobe's $75,000 was to come out of the whole claim in case Judge Black succeeded, and to come out of money to be recovered by Judge Black, and McPherson was to contribute towards it $25,000, and Judge Black the remaining $50,000. The court below decreed the whole $75,000 to Latrobe in his suit against McKee. Latrobe was suing virtually for an amount such as would be due on a *quantum meruit*, and the court below evidently took the sum of $75,000 as the value of Latrobe's services, when it was only the amount agreed by way of compromise between McPherson and Black to pay Latrobe to stop his hostility. McPherson as Cochrane's executor gets nothing as his *pro rata* share, unless it be considered that Mrs. Cochrane's share was his, and certainly McPherson did right to protest against this being paid to the widow, not because he did not wish the widow to get her share, but because he was a bonded officer and willing to give any bond to be exacted of him, having unincumbered real estate in the District of Columbia, (Rec. pp. 123, 124,) and because he mistrusted McKee, who had asserted that Mrs. Cochrane would be satisfied with a paltry $10,000, and that he controlled her—a pretension seemingly warranted by the testimony, and by the further fact that Mrs. Cochrane has not appealed. The court below, by intrenching upon the 5 per cent. to Mrs. Cochrane in favor of

Ward H. Lamon and John H. B. Latrobe, shows that it was not influenced by the argument that the 5 per cent. to Mrs. Cochrane was a gratuity to her. It was seriously argued that the Indian Nation, in giving 5 per cent. of the 30 per centum always dedicated to its attorneys, was, unawares, a donor of this amount. Mr. McPherson claims, in the interpleading, that at least three-fourths of the 30 per cent. should go to him. The testimony shows that Luce got 5 per cent.; that Luke Lea claims 5 per cent. of the whole; that Pike, through Denver, claims 5 per cent., and concedes 5 per cent. to Cochrane as his individual share, making 20 per cent., or two-thirds of the whole interest; and, as these represent the Cochrane claim in interest, the counsel of McPherson further claim that services, under the Cochrane contract, outside of McKee's subsequent services, were worth at least two-thirds of the full amount. Some of the witnesses make it six-tenths, and others four-tenths of the full amount. (Testimony of Ellis and Wilson, pp. 1208, 1219.)

There are some averments in the record to the effect that the Cochrane contract expired by his death, and that it was void by the act of Congress of 1853 prohibiting assignments of claims against the United States. These questions, if at all pertinent, do not come up in the interpleader suit as to the disbursement of the 5 per centum paid into court. Mr. McKee's contract contemplates that services rendered theretofore should be compensated for, and, of course, services rendered in Cochrane's lifetime have to be included. The act of Congress does not apply to a distribution of funds arising from a violation of its enactment.

Brooks *v.* Martin, 2 Wall. 70.

Assignment of Errors.

1. The court erred in decreeing the amount of Latrobe's compensation to be $75,000, so far as a *pro rata* share thereof is made payable out of the fund in court.

2. The court erred in decreeing the amount of Ward H. Lamon's compensation to be $30,000, so far as a *pro rata* share thereof is made payable out of the fund in court.

3. The court erred in decreeing the general fund of $147,057.63 to belong to Ellen Cochrane, John H. B. Latrobe, and Ward H. Lamon.

4. The court erred in denying any title to said fund to belong to John D. McPherson, executor.

5. The court erred in denying any title to any part of said fund to belong to John D. McPnerson, executor.

6. The court erred in decreeing Ellen Cochrane or her solicitors of record to be entitled to said fund, or any part thereof.

GEO. F. APPLEBY,
CALDERON CARLISLE,
For McPherson, Executor.

IN THE

Supreme Court of the United States.

JOHN D. McPHERSON, Executor of JOHN T. COCHRANE, Appellant,
vs.
HENRY E. McKEE and others.
} No. 291.

AMENDED ASSIGNMENTS OF ERROR.

1. The court below erred in considering, in this interpleader cause from which McKee had been discharged, and in which its sole duty was to award or distribute the fund in court, the separate proceedings of Latrobe and Lamon against McKee, which separate proceedings sought to establish a trust with reference to a larger and different fund from that paid into court in this cause, and to obtain personal decrees against McKee.

2. The court below erred in disposing of this interpleader cause by its final decree passed herein as if this cause were consolidated with the separate causes of Latrobe and Lamon against McKee, when as matter of fact no order had ever been passed or could properly have been passed consolidating these causes.

3. The court below erred in decreeing the general fund of $147,057.63, paid into court in this cause, "to be and to have been the property of the defendants Ellen Cochrane, John H. B. Latrobe, and Ward H. Lamon."

4. The court below erred in decreeing the amount due and payable to Ellen Cochrane to be $147,057.63.

5. The court below erred in decreeing in this cause the amount due and payable to John H. B. Latrobe to be $75,000.

6. The court below erred in decreeing in this cause the amount due and payable to Ward H. Lamon to be $35,000.

7. The court below erred in denying the claim of John D. McPherson, as executor of John T. Cochrane, deceased, to be paid out of the general fund of $147,057.63 for professional services rendered by John T. Cochrane in his lifetime.

8. The court below erred in denying any title to any part of said fund to belong to John D. McPherson, executor of John T. Cochrane.

9. The court below erred in decreeing Ellen Cochrane or her solicitors of record to be entitled to said fund or any part thereof.

10. The court below erred in holding the 5 %, or $147,057.63 required by the McKee contract to be paid to Mrs. John T. Cochrane, not to be a provision for the payment of Cochrane's professional services rendered in his lifetime.

11. The court below erred in holding the aforesaid 5 % to be a gratuity from the Indians for Ellen Cochrane, an individual, instead of a payment for Cochrane's professional services during his lifetime, payable to his executor, and which could not by the Indians be diverted from his estate and made payable to his widow.

12. The court below erred in decreeing the amount of the general fund in court in this cause, $147,057.63, to be due and payable to Ellen Cochrane, who claimed in this suit as the widow of John T. Cochrane under the terms of the McKee contract, and in awarding to the said Ellen Cochrane $\frac{147}{5000}$ parts of said fund.

13. The court below erred in decreeing Ward H. Lamon to be entitled to any part of the fund in court, or to be entitled to receive anything from the estate of John T. Cochrane, or from any amount dedicated by the Indians to the payment of the services of the said Cochrane, because the Black contract was never performed or fulfilled, but was utterly abandoned, and the only possible claim

of Lamon on the Cochrane estate is as successor, associate, or assignee of Jeremiah S. Black.

14. The court below erred in decreeing John H. B. Latrobe to be entitled to any part of the fund in court, or to be entitled to receive anything from the estate of Cochrane, or from any amount dedicated by the Indians to the payment of the professional services of Cochrane rendered in his lifetime, because the only right of Latrobe to receive anything from Cochrane's estate was by virtue of his agreement with Cochrane's executor and Black, supplemental to the Black contract and payable only out of moneys to be collected by Jeremiah S. Black, and the Black contract was never performed and fulfilled, but was utterly at an end.

15. The court below erred in not holding that the 5% or $147,057.63 required by McKee's contract to be paid to Mrs. John T. Cochrane was a sum dedicated by the Indians and McKee to the payment of the services of John T. Cochrane rendered in his lifetime, which sum was payable to the executor of Cochrane, and in which his widow's interest was limited by the provisions of the will, in which instrument an equal interest in Luke Lea is recognized.

16. The court below erred in not decreeing the whole $147,057.63 to be paid to John D. McPherson, executor of the will of John T. Cochrane, which recognizes an equal interest in Luke Lea.

GEO. F. APPLEBY,
CALDERON CARLISLE,
For McPherson, Executor.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

JOHN D. MCPHERSON, Executor of JOHN T. COCHRANE, Appellant,
vs.
HENRY E. MCKEE and others.
} No. 291.

Points and Authorities for Appellant.

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} No. 291.

Points and Authorities.

I.

By McKee's bill of interpleader and the decree discharging him, and retaining the 5 per cent., or $147,057.63, paid into court to abide the result of the interpleading of the defendants, certain matters are settled—

(1.) The fund is the very 5 per cent. mentioned in McKee's contract.

(2.) That fund was paid to McKee by the United States on the authority of its own laws, and those of the Choctaw Nation.

(3.) The fund did not belong to McKee, and he claimed no interest in it.

(4.) The Choctaw Nation had voluntarily and lawfully disclaimed any interest in the fund or control over it except as declared in the acts of February 25, 1888.

II.

Though the McKee contract is not here sued on, and comes into the cause collaterally, it shows the origin and history of the fund. The only party to this contract who has ever been before the court—McKee himself, is no longer a party to the cause—and Ellen Cochrane, who is named in the contract as Mrs. John T. Cochrane, and is a party to this cause, was not a party to the McKee contract.

III.

From a reading of the whole McKee contract is to be gathered in the first place the true intent and meaning of that contract; but to properly apply that contract to its proper subject-matter and objects, a resort to extrinsic evidence is not only proper but absolutely necessary.

Bradley *v.* The Packet Co., 13 Pet. 99.
Blake *v.* Doherty, 5 Wheat. 362–3.
Reed *v.* Insurance Co., 95 U. S. 30, 31.

IV.

If this resort to extrinsic evidence, necessary in the first instance to apply to writing to its subject-matter, shall disclose a latent ambiguity, such latent ambiguity may—indeed, must—be explained by extrinsic evidence.

Patch *v.* White, 117 U. S. 210.

V.

The real question here is, was the name of Mrs. John T. Cochrane in McKee's contract intended to describe Ellen Cochrane, the defendant here in her personal capacity, or as the widow and supposed successor to the rights of her husband, John T. Cochrane, who had rendered

valuable services to the Choctaws which they wished to recognize and pay for?

This very question is raised by the ordinary extrinsic evidence necessary to ascertain who Mrs. John T. Cochrane was, to whom 5 per cent. of the Choctaw attorneys' 30 per cent. was dedicated by the Indians; which 5 per cent. Attorney McKee agreed to pay out of the whole of the attorneys' 30 per cent., which had been secured to him.

Cases above cited: Mechanics' Bank. *v.* Bank. of Columbia, 5 Wheat. 326.

VI.

The words of the McKee contract in the light of its true subject-matter, and the situation of the parties, leave no doubt that the true intent and meaning of the parties was to provide as a payment for Cochrane's services *a fixed proportion of the* 30 *per cent. fee*, about which alone (to the exclusion of the delegates' 20 per cent. and the nation's 50 per cent.) the McKee contract was conversant.

See Leflore's Testimony, (Rec. p. 774.)
Weed's Letter, (Rec. p. 225.)

VII.

If the 5 per centum of the 30 per centum was intended as a payment for Cochrane's services, the name of his widow, "Mrs. John T. Cochrane," was either inserted by MISTAKE, under the erroneous impression that she had a right to receive what her husband had earned in his lifetime; or, if inserted with a knowledge of the right of Cochrane's executor, under Cochrane's will and according to the law of his domicile, to receive the payment, then the name of Mrs. John T. Cochrane was inserted in FRAUD of the rights of Cochrane's executor, and the court

of conscience having jurisdiction of the fund, and the parties would on either ground treat the contract as if it read John T. Cochrane's estate or John T. Cochrane's executor.

Stark *v.* Starr, 94 U. S. 877.
Walden *v.* Skinner, 101 U. S. 577.
Lee *v.* Johnson, 116 U. S. 48.
Wheeler *v.* Sage, 1 Wall. 518.

VIII.

Even if this fund had been paid to Mrs. Cochrane it might well have been insisted against her in a court of equity that she took it as *trustee* for Cochrane's estate. But the fund being paid into court in this interpleader case, the court may decree a TRUST in favor of the executor, though the legal title be in Mrs. Cochrane, and award the fund so as to do complete equity between the parties.

Whitney *v.* Cowan, 55 Miss. 626.

Does not a trust naturally result from these circumstances? If A buys land with B's money and takes a deed in his name, does not B get the equitable title, and in a court of equity does not this suffice without more? If A gets land through the instrumentalities of B's money, does not the same result follow? Why should the rule be different if A gets land in payment for B's services, and why if he gets a fund which represents the net proceeds of land in payment for B's services? When B's services are rendered and unpaid for, and the fund for the payment, though directed to be paid to A, is paid into a court of equity, does not B naturally have the title to it? We see no canon of construction violated by giving B the money.

Dwinell *v.* Veazie, 36 Me. 509.
Cases collected Am. Enc. of Law, vol. 10, pp. 9 & 10.

IX.

Was the provision of the McKee contract as to this 5 per cent. a "*payment*" or was it a "*donation?*" Had Cochrane's executor a meritorious claim for services performed by his testator, which created a *debt* due, whatever the difficulties of collection, or was this simply a "*gratuity*?"

A.

The idea that this was a *gratuity* or *donation*, and not a *debt* or *payment*, is supposed, in the first place, to grow out of some infirmity in the Cochrane contract of 1855—

1st. Because it was void under the act of 1853.

2d. Because it was an entire contract and never fully performed.

1st. This court has clearly established the just construction of the act of 1853, (R. S. § 3477,) has declared its true object to be the protection of the government, and as between the parties, and even as against the government where it had full protection otherwise in the same transaction, even assignments within the description of the act have been sustained.

Baily *v.* United States, 109 U. S. 432.
McKnight *v.* United States, 98 U. S. 180.
Burt *v.* Shepherd, (and cases cited,) 127 U. S. 494.
Hobbs *v.* McLean, 117 U. S. 567.

But the Cochrane contract was not a "transfer or assignment," nor a "power of attorney," nor yet an authority "*for receiving payment*" of a claim against the United States or any part thereof. On the contrary, it was an agreement on the part of the Choctaw Nation to pay out of moneys paid to said nation or individuals thereof on account of the claims in question; it was an authority from the Choctaws to the persons into whose hands their

money should come "to pay;" no authority was given to Cochrane or attempted to be given to him to *receive payment* from the United States. It was a contract which recognized, confirmed, and ratified his previous employment for valuable services, and promised compensation measured by a percentage of the claims. Such contracts have been frequently upheld by this court.

Wright *v.* Tibbetts, 91 U. S. 252.
Stanton *v.* Embry, 93 U. S. 548.
Beechman *v.* Lawson, 109 U. S. 659.
Taylor *v.* Bemiss, 110 U. S. 42.

2d. On the face of this contract it appears that Cochrane had been employed three years before its date; the the value and importance of his three years' services were recognized; the continuance of those services was declared to be of the highest importance to the Choctaws. All that Cochrane undertook to do was "*to continue, as heretofore, with zeal, energy, and faithfulness to urge and prosecute all the unsettled claims,*" &c. Cochrane did not agree to get an appropriation, and if he failed to have nothing for his services. Cochrane did not agree that *his right to compensation* for all his past efforts and for all the efforts he should make in all the rest of the days of his life should depend upon his *securing* the payment of the claims, but having agreed to continue his services as before, he "further obligates and binds himself to do his *best and utmost* to obtain payment of said claims and demands, and in all things appertaining thereunto to faithfully represent said nation and guard its interests, and *strive* to enforce its rights at his own cost and expense."

Cochrane's executor is not here claiming in the suit a decree for 30 per cent. under this contract. If he were, and the court should find he had a right to it, they could not decree it to him in this cause. The executor claims here the money which the Indians set aside to pay for

the services which were fully worth the sum allotted; for services which were rendered under an employment antedating the contract; for services which Cochrane never agreed in this contract or in any other writing should be gratuitious, unless after doing everything he promised and agreed to do, his life should be spared to see with his own eyes the tardy fulfilment of the hopes of all concerned.

In the sense in which it is contended for by the counsel for Ellen Cochrane, the contract was not entire, the contract was not unfulfilled, Cochrane could have sued the Choctaw Nation, if they had been suable, in assumpsit for services already performed, the day after the contract was made, and could have given the contract in evidence to support the averments of services performed at the Choctaws' instance and request.

B.

Next it is contended that this provision is a "*gratuity*" or "*donation*," both as applied to Mrs. Cochrane, who was not an attorney, rendered no service, and from whom in her personal capacity no consideration, legal or moral, moved to the Choctaws, and as to the executor of Cochrane, whose testator was an attorney who had rendered valuable service, and from whom had moved a meritorious consideration raising both a legal and a moral obligation on the part of the Choctaws. This contention is based on the fact that the Choctaws, though wards of the United States, are, so far as legal proceedings against them in the courts of the United States, an independent nation, which could not in the courts of the United States be compelled to pay; and that, therefore, the contract with McKee, and the legislation of the Choctaws authorizing him to draw the money necessary to carry out the provisions of that contract, were but acts of grace and favor which created no rights. And

this was seriously argued in the court below in this cause into which McKee had paid the money, and from which he had been discharged.

But all this reasoning has been held bad in this court in regard to thoroughly independent nations, and when the moneys in question were awards for national wrongs for which a tribunal could only be provided by diplomatic negotiations and international agreement, and this as well when the fund, lawfully in our courts, was awarded to a foreign nation, in respect of a claim of its subject, as when the money had been awarded to the United States in respect of a claim of an American citizen.

Phelps *v.* McDonald, 99 U. S. 298.
Comegys *v.* Vasse, 1 Pet. 193.
Milner *v.* Metz, 16 Pet. 221.

X.

When the Choctaws said in their contract that they had parted with this 5 per cent., and why and for what they had parted with it; when they had confirmed this action by giving McKee authority to draw out this 5 per cent., together with what he had reserved for himself, and as a fund from which to adjust all claims for services rendered before the date of his contract; when McKee produced this money in court and told where he had got it and why he paid it in, the court was given jurisdiction and authority to construe McKee's contract as fully and freely as if it had been made with an individual, and to dispose of this fund according to the true principles of equity, just as if the Choctaw Nation had never had any interest in it, or the money had never been in the Treasury of the United States.

McKnight *v.* United States, 98 U. S. 179.
Gilmore *v.* Devlin, McA. & Mack. (D. C.) 306.

XI.

Cochrane had at his death a meritorious claim against the Choctaws for valuable and legitimate services rendered by himself, and of which the Choctaws had and have still the full benefit.

Cochrane's executor had a right to receive compensation for his testator's services quite independent of the question as to the contract of 1855, its entirety, and its validity; quite independent of his power to enforce the collection of the claim without the co-operation of the Choctaws.

The terms of Cochrane's contract were, as already seen, that he was to continue as theretofore, with zeal, energy, and faithfulness, to urge and prosecute all the unsettled claims and demands of the Choctaw Nation, and especially the net proceeds claim, and obligated him *to do his best and utmost* to obtain payment of said claims and demands, and in all things appertaining thereto to faithfully represent the said nation and guard its interest and *strive* to enforce its rights at his own cost and expense.

Under this contract he succeeded in procuring the treaty of 1855, and under it in 1859 the award of the Senate, which was in effect an adjudication of the claim. In pursuance of this award Cochrane obtained in 1861 an appropriation of half a million dollars and the actual payment of a quarter of a million. Further, when the nation had forfeited its right to payment by its participation in the rebellion, he succeeded in reinstating those rights by the treaty of 1866.

The obligation on his part was a personal obligation for personal services which of course would cease at his death. Neither in express terms or impliedly was there any obligation on his part to do more. He did not agree to accomplish a certain result, but "to do his best and utmost," that means while living. He did agree to wait for his compensation until the claim had been paid.

The case is analogous to that of Embry administrator of Atkinson *v.* Stanton and Palmer. Atkinson was employed by the defendants to prosecute a claim before the accounting officers of the Treasury upon a contingent fee. One of the defences was, that before or about the time the award was made in favor of his clients by the Treasury officials, Atkinson became mentally diseased and rendered incapable of doing anything further, and before Congress had provided for the payment of the award Atkinson died. Chief Justice Cartter in his charge to jury (8th paragraph) uses the following language:

"It is urged here that without you find that the labor of the intestate continued to the period of satisfaction of this claim by the government, you will not render a verdict for the plaintiff. This prayer is predicated on the fact that before the ultimate payment Atkinson was seized with mental disease and shortly before became insane and incapable of discharging professional services. It is therefore reasoned that he is not entitled to recover because his claim was predicated on the contingency of realization, and because he was overtaken with sickness before his clients were overtaken with justice. This would be an unjust conclusion to come to. The spirit of this contract is that he will mingle his labor and intellect with those of the accounting officers with a view to superinduce the result his clients wished, and if you find that it was through his labor and industry or enlightenment (for his office was simply to enlighten the judgment of the gentlemen in charge of the claim) that the claim was satisfied, and not through those of other agents—that the fruit of the claim grew out of his labor—you will find that he is entitled to his pay notwithstanding that he died a day or two before the claim was paid. This is the Christianity of this case, and I inform you it is also the law of this case."

Exceptions were taken to the charge, and the case came to this court on appeal, and the judgment below was affirmed.

Stanton *v.* Embry, 93 U. S. 548.

XII.

McKee in his bill before this money was paid in treats it not as his money, but as a trust fund. He says (104 sec. 9,) he and Blunt "have and claim no personal title to or property interest in their own right in said five per cent. stipulated * * * to be paid to Mrs. John T. Cochrane," and he offers to pay it into court. It is certain then that he received it as a trust fund.

Did the Choctaws so understand it? It may be conceded that their delegates did not say so in the McKee contract. But their understanding is to be gathered, in the first instance, from Leflore's testimony, (R. p. 774,) and Weed's letter, (R. p. 225.)

They never saw the McKee contract, and knew nothing of it but what Leflore told them. (R. p. 779.) And he told them that it was a mode of carrying out the Cochrane contract. McKee had assumed the position of Cochrane, and Weed at the request of McKee wrote Leflore a letter to influence the Choctaw Council—to reassure them—give them confidence. (Rec. p. 225.)

In it he endeavored to show that everbody concerned was provided.

Among those mentioned as having rendered services and entitled to pay was "(5) John T. Cochrane, deceased. Mr. McKee agrees in his contract to pay the widow of John T. Cochrane, deceased, 5 per cent. out of the said 30 per cent., and I understand this arrangement is satisfactory not only to Mrs. Cochrane, but to Mr. Cochrane's executor."

Leflore got this letter and used it as intended.

At the Choctaw Council the subject of the net proceeds money, not yet appropriated by Congress, was laid before that body by the clerk and referred to a committee of nine.

Leflore handed Weed's letter to the committee and corroborated it. (Rec. pp. 774–5.)

The Council had then first heard of the McKee contract, (Rec. p. 777,) and Leflore told them it was intended to and would carry out the Cochrane contract.

The Council must have understood the McKee contract as explained by Weed, and that was that the payment to be made to Mrs. Cochrane was for J. T. Cochrane's executor as compensation for Cochrane's services.

It was upon the faith of that letter and McKee's representation that the acts of February 25, 1888 were passed by the Choctaw Council.

The fifth section of the Choctaw act of February 25, 1888, confirming the McKee and Luce contracts, and directing payments thereunder, leaves no doubt that the Choctaws understood and meant to provide that the 5 per cent. in the McKee contract was a payment and discharge and satisfaction of a contract and obligation of the nation to an attorney for services rendered to the nation.

McKee's agent and counsel, Weed, had represented that the 5 per cent. was such a provision. This bound McKee. Weed also represented that the arrangement was satisfactory not only to Mrs. Cochrane but to Cochrane's executor. If it was a payment for services, it was to go to the executor, and Mrs. Cochrane sent word to the executor's counsel that she relied on McKee, but was perfectly willing that what might be coming to her should come through her husband's executor. (Rec. p. —.)

The text of the fifth section above referred to is as follows:

"SEC. 5. That the payments herein directed to be made shall, when made, either under this act, or said other two acts hereinbefore referred to, be taken and accepted as full and complete payment and final discharge and satisfaction of all the contracts and obligations of the Choctaw Nation to any and all attorneys for services rendered to the nation in the prosecution of said claim against the United States."

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

Worcester *v.* State, 6 Pet. 515, 582.

"In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence."

Chicago *v.* Sheldon, 9 Wall. 54.

If, therefore, the court shall find—as it cannot but find from the words of the McKee contract, in the light of the evidence—that the 5 per cent. therein mentioned was a recognition of and provided for Cochrane's claim for services, is not all the law as well as the equity with Cochrane's executor, and must not the fund be decreed to him? Equity does not look to form but substance. Has Mrs. Cochrane any equity? Shall this court permit her, through the efforts of counsel nominated by McKee, (Rec. p. —,) to rob her sister-in-law, Mrs. Magruder, or her heirs, and to defeat the intention of her husband's will, which she has already accepted and ratified, on the sole ground that *a name* was inserted without her knowledge in a contract, of which McKee, on whom she relied, never told her, and of which she never heard till this suit had been filed and the right to this money had been submitted to a court of conscience.

And by what name was the defendant, Ellen Cochrane, described in that contract? By the name of Mrs. John T. Cochrane; by the name which she had borne in the lifetime of her husband, when he toiled for her;

by his name, John T. Cochrane, a name indissolubly connected with the Choctaw claims, especially with this net proceeds claim; connected with it by long and arduous, honorable, and successful service; connected with it by the solemn declaration of his will made upon his deathbed; connected with it by this very contract made without the knowledge of his widow or executor; connected with it by the Choctaw Nation which he served so long, so faithfully, and so well; connected with it by McKee, himself a quarter of a century ago, when his contract admitted that he ought not to have for himself all of the 30 per cent., a name connected with the net proceeds claim by this great tribunal itself after a generation had passed away, by holding the Senate award, made possible by the labor and services of John T. Cochrane, to be the true measure of the debt of the United States to his client and employer, the Choctaw Nation.

Conclusion.

Looking to substance and not to form, to persons and not to mere names or symbols, to services and not to speculations, to right and justice and equity, the fund in court should have been decreed to John T. Cochrane's executor, the appellant, John D. McPherson.

Respectfully submitted.

GEO. F. APPLEBY,
CALDERON CARLISLE,
For McPherson, Executor.